Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

ACCEPTANCE INSURANCE COMPANIES, INC.,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner, which conducted a federally regulated crop insurance business, was prevented from selling its crop insurance business by the regulator's assertion of authority to approve or deny the sale. Petitioner brought a takings claim based on the denial of the sale and the events it precipitated. The questions presented are:

1. May a fundamental property right, such as the right of disposition, be entirely negated merely because a regulator has some authority with respect to the exercise of that right?

2. Is the Federal Circuit's rigid doctrine requiring a taking be "pinpointed" to a single act and rejecting the concept that a taking can result from the sum of a series of interconnected events consistent with the practical, ad hoc approach frequently articulated by this Court in its takings cases, for example, *Penn Central Transp. Co. v. City of New York*?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner Acceptance Insurance Companies Inc., was a publicly held insurance holding company, now in bankruptcy. Among its wholly-owned operating companies was American Growers Insurance Company, a crop insurance company, now in liquidation under supervision of the Nebraska Department of Insurance.

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OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals for which review is sought is *Acceptance Insurance Companies Inc. v. United States*, 583 F.3d 849 (Fed. Cir. 2009), reprinted at App. 1a. The Court of Appeals affirmed the judgment of the Federal Court of Claims dismissing the case, 48 Fed. Cl. 111 (Fed. Cl. 2008), reprinted at App. 21a.

Other opinions and orders in this case that are not significantly relevant to the matters at issue in this petition are reported or available at 503 F.3d 1328 (Fed. Cir. 2007); 72 Fed. Cl. 299 (Fed. Cl. 2006); 2006 WL 3538946 (D. Neb. Dec. 7, 2006).

JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit for which review is sought was entered on October 1, 2009. This Court has jurisdiction under 18 U.S.C. § 1254(1) to review the judgment of the Court of Appeals by writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any

> person be subject for the same offence to be twice put in jeopardy or life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Risk Management Agency, a subagency of the Department of Agriculture, was established pursuant to 7 U.S.C. § 6933 to supervise the Federal Crop Insurance Corporation and to administer and oversee all aspects of the Federal Crop Insurance Act, App. 44a, 7 U.S.C. §§ 1501-1524. Section 6933 states:

> **§ 6933. Office of Risk Management**
>
> (a) Establishment
> Subject to subsection (e)[1] of this section, the Secretary shall establish and maintain in the Department an independent Office of Risk Management.
>
> (b) Functions of Office of Risk Management
> The Office of Risk Management shall have jurisdiction over the following functions:
>
> (1) Supervision of the Federal Crop Insurance Corporation.
>
> (2) Administration and oversight of all aspects, including delivery through local offices of the Department, of all programs authorized under the Federal Crop Insurance Act (7 U.S.C. 1501 et seq.).

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[1] So in original. There is no subsection (e) in this section.

(3) Any pilot or other programs involving revenue insurance, risk management savings accounts, or the use of the futures market to manage risk and support farm income that may be established under the Federal Crop Insurance Act or other law.
(4) Such other functions as the Secretary considers appropriate.

(c) Administrator
(1) Appointment
The Office of Risk Management shall be headed by an Administrator who shall be Appointed by the Secretary.
(2) Manager
The Administrator of the Office of Risk Management shall also serve as Manager of the Federal Crop Insurance Corporation.

(d) Resources
(1) Functional coordination
Certain functions of the Office of Risk Management, such as human resources, public affairs, and legislative affairs, may be provided by a consolidation of such functions under the Under Secretary of Agriculture for Farm and Foreign Agricultural Services.
(2) Minimum provisions
Notwithstanding paragraph (1) or any other provision of law or order of the Secretary, the Secretary shall provide the Office of Risk Management with human and capital resources sufficient for the Office to carry out its functions in a timely and efficient manner.

STATEMENT OF THE CASE

This is a regulatory takings case. At the time of the alleged taking, Acceptance Insurance Companies Inc. (Acceptance) was a publicly-traded insurance holding company. Among its wholly-owned operating subsidiaries was a crop insurance company, American Growers Insurance Company (American Growers), through which Acceptance engaged in the business of crop insurance and participated in the federal crop insurance program which subsidizes crop insurance and reinsures participating writers of such insurance. *See* App. 4a, 583 F.3d 849, 851 (Fed. Cir. 2007). The Federal Crop Insurance Corporation (FCIC) is a wholly owned government corporation within the Department of Agriculture that provides reinsurance to private crop insurance providers. App. 3a, 583 F.3d at 851. The Risk Management Agency (RMA) is a sub-agency within the Department of Agriculture that has authority to supervise the FCIC and administer all programs authorized by the Federal Crop Insurance Act (FCIA). 7 U.S.C. § 6933 (establishment and authority of RMA); App. 44a, 7 U.S.C. §§ 1501-1524 (FCIA). Federal regulation of crop insurers who accept federal reinsurance is in addition to the pre-existing system of state insurance regulation by which the domiciliary state regulator, in this case the Nebraska Department of Insurance (NDOI), has primary regulatory authority over insurers domesticated in the state. The state regulator, among other things, establishes the solvency requirements for insurance companies. Moreover, when a crop insurer fails to meet financial requirements, the state insurance commissioner, not the RMA, has the authority to put the insurer into rehabilitation or liquidation.

In November of 2002, American Growers disclosed it had suffered a $130 million loss in the third quarter of that year. App. 5a, 583 F.3d at 852. This quarterly loss caused American Growers' policyholder surplus to fall below the amount required by the NDOI. App. 5a, 583 F.3d at 852. Such a capital surplus shortfall is a matter of impaired corporate capital at a particular point in time; it does not mean that the long term profitability of the underlying book of business is impaired. If an insurer's book of business has the prospect of being profitable over time, the insurer can sell the book to another insurer that has the capital to assume that business and manage it for future profit. An insurer's book of business therefore can have value even if the insurer no longer can operate under applicable state regulations due to a shortfall of required capital surplus.

Ordinarily, insurance regulators would welcome the transfer of an insurance business portfolio from a weakened insurer to a different insurer that has the financial and managerial wherewithal to assume the business. Such a transfer solves the problem created by the impairment of the selling insurer while avoiding putting the insurance company into rehabilitation or liquidation.

On November 18, 2002, Acceptance entered into a non-binding letter of intent with Rain and Hail, LLC (Rain & Hail), a strong and respected crop insurer in the federal crop insurance program, pursuant to which Acceptance would sell the crop insurance business to Rain & Hail for not less than $21.5 million. App. 5a, 583 F.3d at 852; App. 24a, 84 Fed. Cl. at 113. Because the insurance assets to be sold were reinsured by the FCIC, the proposed transaction was subject to

approval by the RMA. App. 5a, 583 F.3d at 852 The RMA and the Director of the NDOI mutually understood that if the RMA refused to approve the sale, the NDOI would immediately seize control of American Growers and the crop insurance book of business. The RMA and the NDOI further understood that the NDOI would defer to the RMA with respect to the redistribution of the book of business to other crop insurers if the NDOI were to place American Growers in liquidation.

On November 22, 2002, the RMA rejected the proposed sale, concluding the sale would be detrimental to the public interest in that it would adversely affect the interests of farmers and taxpayers.[2] App. 6a, 583 F.3d at 582. Discovery revealed that the supposed public detriment was the agency's perceived risk that former agents of American Growers might sue the RMA if the transfer resulted in the termination of their agencies.[3] Later that same day, as the RMA knew would happen, the NDOI took control of American Growers and all of its assets. *See* App. 25a, 84 Fed. Cl at 113. As a consequence, the RMA entirely dispossessed Acceptance of the crop insurance business it had operated through American Growers. As also was expected, the RMA assumed authority over the redistribution of the crop insurance

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[2] Prior to this, the RMA had approved such transfers of crop insurance business from a weakened insurer to a stronger one, for example, when American Growers, with the RMA's encouragement, assumed the portfolio of a failing crop insurer some years earlier.

[3] This never before had been cited by the RMA as a reason for which a transfer could be rejected.

portfolio to other crop insurers, including Rain & Hail, in the liquidation proceeding. App. 6a, 11a, 583 F.3d at 852, 854; App. 25a, 84 Fed. Cl. at 113. By blocking the sale to Rain & Hail and redirecting Acceptance's assets to other insurers, the RMA caused Acceptance to suffer a complete and permanent loss of its property interest in its crop insurance business, including its portfolio of 360,000 in-force policies. This constituted a taking of Acceptance's property. Acceptance received nothing for property that a buyer the day before had been willing to purchase for not less than $21.5 million.

On December 9, 2003, Acceptance filed a complaint in the United States Court of Federal Claims alleging that the actions of the RMA constituted a taking without just compensation in violation of the Fifth Amendment. On February 10, 2004, the Government filed a first motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim asserting, among other things, jurisdiction of the case resided exclusively in district court not the Court of Federal Claims. On August 13, 2004, that motion was denied. On April 11, 2005, Acceptance filed a first amended complaint.

In December 2005, the case was transferred to a different judge in the court of Federal Claims. The parties thereafter completed discovery. On February 10, 2006, the Government filed a renewed motion to dismiss on grounds that had already been raised and specifically rejected by the first judge assigned to the case. In the alternative, the Government moved for summary judgment. Acceptance opposed the Government's second motion to dismiss and cross-moved for summary judgment.

In its renewed motion to dismiss, the Government argued, as it had in the first motion to dismiss, that the Court of Federal Claims lacked subject matter jurisdiction because Section 1506(d) of the FCIA, 7 U.S.C. § 1506(d), grants exclusive jurisdiction to the federal district courts in cases involving the FCIC or the RMA. *Acceptance Ins. Cos. Inc. v. United States*, 503 F.3d 1328, 1336-37 (Fed. Cir. 2007).

The court never ruled on the cross-motions for summary judgment. Rather, the judge to whom the case was reassigned granted the motion to dismiss and transferred the case to district court on the basis that the district courts have exclusive jurisdiction over all cases involving the FCIC or the RMA. Acceptance then filed a motion to retransfer the case to the Court of Federal Claims under 28 U.S.C. § 1631. The district court denied the motion to retransfer, and Acceptance appealed that decision to the Court of Appeals for the Federal Circuit. The Circuit court held that the FCIA does not divest the Court of Federal Claims of Tucker Act jurisdiction in takings cases involving the FCIC or the RMA where the United States is the proper defendant. 503 F.3d at 1329, 1333. The Circuit court ordered the District Court to transfer the case back to the Court of Federal Claims for adjudication of Acceptance's takings claim. *Id.* at 1338-39.

Notwithstanding that the parties had long since completed discovery; the cross-motions for summary judgment remained pending; the Government already had filed two motions to dismiss; and the court had set a trial date, on April 30, 2008, the Government filed yet a third motion to dismiss raising entirely new arguments. The Court of Federal Claims granted this

motion on September 25, 2008 and dismissed the case with prejudice. App. 21a-43a, 84 Fed. Cl. 111.

Acceptance timely appealed this decision to the Court of Appeals for the Federal Circuit. The Federal Circuit upheld the dismissal on the grounds that by entering a regulated industry in which transfers of crop insurance business from one insurer to another are subject to oversight by the RMA, Acceptance did not have a sufficient property interest necessary to maintain a Fifth Amendment takings claim. The court also held that Acceptance could not premise a takings claim on the series of events beginning with the rejection of the sale to Rain & Hail and culminating in the RMA's assertion of dominion and control over the crop insurance policies and their redistribution by the RMA to other crop insurers. Rather, to have a claim Acceptance must pinpoint a particular, single act of the agency that constituted the alleged taking, which in the court's view had to be the RMA's rejection of the sale, an act which could not be sufficient basis for a takings claim because Acceptance had given up the right of disposition by entering the field of regulation. Acceptance requests that this Court grant a writ of certiorari to review this judgment of the Court of Appeals for the Federal Circuit.

REASONS FOR GRANTING THE WRIT

I. In holding that Acceptance had no cognizable property right to sell its crop insurance assets because of the general regulatory oversight of the RMA, the Federal Circuit has abandoned the usual regulatory takings analysis in favor of a rigid rule holding that a fundamental property right, such as an insurance company's right to sell its assets, no longer exists if regulation, to some degree or in some circumstances, touches that property right.

This case presents an opportunity for this Court to address the Federal Circuit's departure from normal regulatory takings analysis in regulated industries cases. The Federal Circuit has created a rule whereby the existence of regulation itself destroys any cognizable property interest touched by regulation, thus vitiating any possible takings claim, and entirely sidestepping the searching analysis that would otherwise be required in a takings case.

The most prominent touchstones in the jurisprudence of regulatory takings are *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). The Federal Circuit's opinion never reaches the multi-factor analyses called for by these cases.[4] Rather, the court declares that

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[4] *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (considerations include the regulation's economic effect on the owner, character of the government action, and extent to which it interferes with owner's reasonable investment-backed expectations); *Lucas v. South Carolina Coastal Council*, 505 U.S.

Acceptance never had a property interest in the disposition of its crop insurance business and, therefore, the RMA could not have committed a taking by rejecting the proposed sale to Rain & Hail. App. 17a-18a, 583 F.3d at 857-58.

This is so, the court concludes, because the RMA had the authority to approve or disapprove the sale of the crop insurance portfolio to a different crop insurer. "[B]ecause the RMA had the authority to deny the sale of the policies at issue, Acceptance . . . did not possess the unfettered right to sell or otherwise transfer the policies, thus precluding the existence of a cognizable property interest." App. 17a-18a, 583 F.3d at 858. The problem with this reasoning is that the three fundamental attributes of ownership, the rights "to possess, use and dispose of" the property, do not have to be entirely "unfettered" by regulation in order to exist.[5]

1003, 1015 (1992) ("we have generally eschewed any 'set formula' for determining how far is too far, preferring to 'engag[e] in . . . essentially ad hoc, factual inquiries.'") (quoting *Penn Central*, 438 U.S. at 124); *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001) (whether a regulatory taking has occurred depends on "a complex of factors").

[5] Until regulatory action reaches the point where the economic value of the owner's property is completely destroyed so as to constitute a per se taking under *Lucas*, the *Penn Central* analysis applies. The *Penn Central* test is explicitly designed to deal with regulatory impairments that are less than total. It thus requires examination of the degree of economic harm suffered and the degree to which investment-backed expectations are thwarted. 438 U.S. at 124.

For example, the owners of a bank have a right to possess the bank free of government seizure, unless the bank gets into financial trouble as statutorily defined. Statutory bank seizures "do not constitute regulatory takings under the Fifth Amendment because investors in banks do not have a reasonable investment-backed expectation that regulators will not seize banks that are deemed to be in trouble." *Thykkuttathil v. United States*, 88 Fed. Cl. 293, 296 (Fed. Cl. 2009) (citing *Golden Pac. Bancorp v. United States*, 15 F.3d 1066, 1074 (Fed. Cir. 1994)), *accord*, *California Housing Sec., Inc. v. United States*, 959 F.2d 955, 956-57 (Fed. Cir.) (bank owners have no "historically rooted expectation" of takings compensation if a bank is seized when statutory criteria for seizure are met), *cert. denied*, 506 U.S. 916 (1992). Likewise, a bank seizure not moored to the statutory criteria could well constitute a compensable taking.[6] The absence of reasonable investment-backed expectations in one circumstance does not mean the absence of such reasonable expectations in other circumstances. Thus, the Federal Circuit's holding that there is no cognizable right to disposition of property unless it is entirely "unfettered" is plainly incorrect.

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[6] "[E]ven in an area regulated as heavily as banking, numerous possible government actions would invoke the Fifth Amendment. For example, confiscating a healthy and legally compliant bank . . . ." *Ambase Corp. v. United States*, 58 Fed. Cl. 32, 51 (Fed. Cl. 2003). "The range of expectations that is reasonable may be reduced in proportion to the amount of regulation, but this is not a blanket rule that disqualifies parties' expectations without inquiry." *Cienega Gardens v. United States*, 331 F.3d 1319, 1350 (Fed. Cir. 2003).

The consequence of the Federal Circuit's error is that Acceptance is deprived of any cognizable interest in the disposition of its property merely because the RMA has general supervisory authority over the crop insurance program, including the asserted authority to review and pass upon proposed sales of a book of business from one crop insurer to another. The Federal Circuit's own bank seizure cases show that the dissipation of a cognizable property interest must be tied to particular criteria set forth in statute or regulation, and the property interest is obviated only to the extent of the stated criteria because those criteria define the boundary past which the property interest is abrogated.

In this case, the RMA acted under a statute giving it general supervisory authority over the federal crop insurance program. 7 U.S.C. § 6933 (establishing the RMA and its authority over the federal crop insurance program). See also, the Federal Crop Insurance Act, App. 44a; 7 U.S.C. §§ 1501-1524. There are no statutory provisions or regulations identifying or explaining the criteria under which the RMA shall approve or deny a proposed bulk sale of a block of crop insurance business from one crop insurer to another. One might presume that the RMA's general authority could include the ability, for example, to deny a sale that would result in the transfer of crop insurance policies to another insurer that would not have the financial or managerial wherewithal to handle the increased risk and responsibility of the additional policies. In that event, it might be said that Acceptance had no reasonable investment-backed expectation to execute such a sale. But nothing of the sort was the case here. Rain & Hail was a strong and

stable company with a sterling reputation in the crop insurance industry.

Here the sale was denied for a reason having nothing to do with the merits of the transaction itself, the quality of the purchaser or the preservation of coverage for insured farmers. A seller might well anticipate that in a regulated environment it could not have a reasonable expectation of being able to execute a sale that was fraudulent, or to an unqualified purchaser or that impaired continuing coverage to the insureds. Here the RMA's stated reason why the sale would be detrimental to the interests of taxpayers and farmers was the RMA's concern that former agents of American Growers might sue the RMA. No history, custom, statute or regulation put Acceptance on notice that what otherwise should have been a routine sale would be blocked for such a strained, irrelevant, unexpected and unprecedented reason. Although the RMA was presumptively within its rights under its general authority over the crop insurance program to extend its approval prerogative to foreclose the risk that it might be sued by disgruntled agents, that certainly was not something that Acceptance or any insurer in the industry could have anticipated. Acceptance certainly would not have foreseen being denied the right to sell based on the RMA's perceived fear of lawsuits. The RMA's action may have been perfectly proper and within its authority, but it was certainly no more "expected" than being struck by a bolt of lightning.

While it is true, as the Federal Circuit notes, App. 16a, 583 F.3d at 857, that "existing rules and understandings" and "background principles," such as state, federal or common law, help define the contours

of property rights for purposes of takings analysis, if this reasoning is going to be used to completely extinguish so fundamental a property right as the right of disposition, those rules, understandings and background principles must be clearly discernible. If that were not the case, it would be absurd to say that a person entering a regulated industry "voluntarily" relinquishes a given property right.[7]

In the bank seizure cases cited above, the Federal Circuit was careful not to say that a bank's right to be free from government seizure is completely extinguished simply because seizure is possible in certain circumstances. Rather, that right cuts off only at the point where the statutory criteria for seizure, such as unsound condition, are met. In this case, by contrast, there is no nuanced examination of the statutory background, criteria or markers. The court jumps directly from the fact that denial of a crop insurance transfer is theoretically possible to the conclusion that Acceptance was completely divested of a cognizable property right to sell its policies the minute it voluntarily entered into the regulated world of crop insurance.

This un-nuanced, absolutist view that possible interference with property rights upon entry into a regulated industry is the same as the total extinguishment of them fatally undermines the

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[7] According to the Federal Circuit, "by voluntarily entering into the federally regulated crop insurance business, Acceptance relinquished its right to freely transfer American Growers' insurance policies, in exchange for the benefits of the crop insurance program, such as being reinsured by the government for certain losses." App. 17a, 583 F.3d at 857.

regulatory takings analysis that this Court has developed. One never reaches the *Penn Central* factors, for example, if it can so readily be concluded that there is no property interest by virtue of entry into a regulated industry.[8] Given the pervasiveness of industry regulation in the modern world, the Federal Circuit's willingness to leap directly to a holding of no cognizable property interest in *any* circumstances obliterates the fact that regulation undermining fundamental property rights is ordinarily circumstance specific. A bank can be seized if it becomes unsound, but not otherwise. A sale of

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[8] This Court has recognized that there is a relationship between the scope and degree of regulation in a regulated industry and the "investment-backed expectations" factor in the *Penn Central* analysis. Thus, in *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 227 (1986), the Court found that employers in multiemployer pension plans "had more than sufficient notice" of potential exposure to withdrawal penalties. That "sufficient notice" negated any supposed investment-backed expectations to the contrary. This Court, however, has never come near stating that entering an industry in which regulation, under some circumstances, touches a fundamental property right – such as the right that insurance companies have to dispose of their business portfolios – means that no such right of disposition exists at all. Further, while citations to the "investment-backed expectations" passage in *Penn Central* have been ubiquitous in this Court's takings cases for over three decades since *Penn Central*, there has been no direct holding clarifying the meaning of the phrase. Nor has this Court had occasion to expound on how the concept should be applied in what may well be one of its most important applications: the availability of takings claims to participants in the vast segments of the economy that constitute regulated industries. This case presents an opportunity for the Court to consider how long-standing, but still not fully developed, concepts such as *Penn Central*'s "investment-backed expectations" and *Lucas*' "background principles" inform the takings analysis in modern regulated industries.

securities can be enjoined if it is tainted by misrepresentations. The proper approach to the "background principles" contained in the regulatory scheme is to use them to identify the particular circumstances under which a property right may be abrogated. Then in those circumstances it can rightly be inferred that there was no reasonable expectation of a compensable taking. But outside those circumstances, both the expectation and the property right should exist.[9]

In sum, the fact of entering a regulated industry in which certain property rights may be curtailed in certain circumstances does not mean that those property rights do not exist at all. That is why a searching, ad hoc analysis of the particular circumstances under consideration, together with the arguably relevant regulatory "background," must be made in order to say whether the acts and events in question abrogated a property right that should fairly be said to still exist notwithstanding some impairment or impairment in some circumstances. Declaring the

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[9] As stated in *Lucas*, the Supreme Court's resort to existing rules or understandings to define the range of interests that qualify for protection as "property" under the Fifth Amendment recognizes that the Takings Clause does not require compensation when an owner is barred from putting property to a use that is proscribed by those existing rules or understandings. 505 U.S. at 1030. By logical extension, what is not proscribed persists as "property" potentially subject to compensation for its taking. Thus, a court must necessarily make a scrupulous analysis of what the background law really is and what it really proscribes. "Our opinion in *Lucas* . . . would be a nullity if 'background law' – regardless of whether it is really such – could eliminate property rights." *Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994) (SCALIA, J., dissenting from the denial of certiorari).

property right dead on arrival and for all purposes because it will not be operative in certain circumstances – which is essentially what the Federal Circuit did in this case – is not enough. That approach in effect evades the regulatory takings analysis required by *Penn Central* on false logic and advances a new stream of Federal Circuit "regulated industry" takings cases that will undercut takings claims in regulated industry cases so broadly that it could lead perilously close to a per se exception from takings liability in regulated industry cases.

The potentially profound effects of the Federal Circuit's approach on vast and multifarious regulated industries, and untold numbers of persons and entities who operate within those regulated industries, recommend this case for the Court's review and examination. This Court should grant the writ in order to address whether or under what circumstances it is correct to say that a person has lost a fundamental property right by virtue of entry into a regulated industry.

II. The Federal Circuit's doctrine that it is necessary to pinpoint a single, discrete act as constituting the taking results in an artificial division of related series of acts that should cumulatively determine whether a taking occurred and what type it was, thereby subverting this Court's practice of according takings claims realistic, ad hoc scrutiny.

Distilled to its essence, this case is ultimately an appropriation in three steps, beginning with (1) the RMA's denial of the proposed sale, (2) which it knew would precipitate seizure of American Growers by the

Nebraska Department of Insurance, (3) after which the RMA would assume control over the distribution of the crop insurance policies to other crop insurers. The RMA was fully aware that each step would lead to the next. As a result of this chain of events, Acceptance was entirely dispossessed of the crop insurance business it operated through American Growers. As the RMA also expected, the RMA assumed authority over the redistribution of the crop insurance portfolio to other crop insurers – Acceptance's erstwhile competitors, including Rain & Hail – in the liquidation proceeding. App. 6a, 11a, 583 F.3d at 852, 854; App. 25a, 84 Fed. Cl. at 113. Thus, the RMA's blocking of the sale and the redirection of the policies to other insurers necessarily and predictably resulted in the categorical taking and permanent loss of all of Acceptances's property interest in the crop insurance business, including the portfolio of insurance policies that it had intended to sell to Rain & Hail. Acceptance received nothing for property that a buyer, the day before the RMA ignited the chain of events, had been willing to purchase for more than $21.5 million.

The Court of Federal Claims had correctly described Acceptance's claim in terms of a constellation of operative facts: "The "transfer of Acceptance's assets, accomplished by the RMA without compensation to Acceptance, as well as the RMA's exercise of control over the crop insurance policies, and its redistribution of the policies to other crop insurers forms the basis of Plaintiff's regulatory takings claim." App. 25a-26a, 84 Fed. Cl. at 113.

The Federal Circuit refused to look at the events as a whole, notwithstanding that, as a matter of common sense, it is obvious that they were interrelated. They

were, in the most literal sense of the term, a "chain of events." The refusal to condone the sale led to the forced failure which led to the appropriation and redistribution by the RMA of the policies to private parties, all in connection with the "public good" in avoiding the presumed risk of suits against the RMA by insurance agents.

Taken as a whole, these events make out a categorical takings case under *Lucas*. The Federal Circuit avoided considering this by insisting that a taking must be "pinpointed" as residing in a single act. The plaintiff must "pinpoint the precise action that it contends constituted conduct the government could not engage in without paying compensation." App. 13a, 583 F.3d at 855.

> Acceptance characterizes the alleged taking as consisting of several distinct actions viewed in concert. We have stated, however, that such a "characterization . . . is too broad" because "it does not pinpoint what step in the sequence of events . . . constituted conduct that the government could not engage in without paying compensation."

App. 12a-13a; 583 F.3d at 855 (quoting *Branch v. United States*, 69 F.3d 1571, 1575 (Fed. Cir. 1995), *cert. denied*, 519 U.S. 810 (1996)).

This rigorously applied "pinpoint" doctrine appears to be the Federal Circuit's own innovation, and is inconsistent with this Court's flexible, realistic, ad hoc

approach to takings analysis.[10] There is no logical reason why a taking cannot be found in the sum of a series of interconnected events. The Federal Circuit's command to pinpoint a precise step that constitutes the taking can make the final result of the actions appear to be detached from the earlier steps. That is what happened here. The court concluded that the taking had to be found in the initial act of denying approval of the sale to Rain & Hail. This made the fact of the RMA's assertion of control over the policies and their redistribution by the RMA immaterial in the eyes of the court. In Acceptance's view, of course, the appropriation of the policies was the very consummation of the taking.

The court's doctrinaire segmentation of connected events makes it impossible for the court seriously to consider the fact that the rejection of the sale in this case was the means by which the RMA positioned itself to assert control over the policies during the NDOI's liquidation proceeding and redistribute them to other insurers in a setting that would insulate it from the feared risk of lawsuits by insurance agents.

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[10] *Brown v. Legal Found. of Washington*, 538 U.S. 216, 1417-18 (2003) (Supreme Court's regulatory takings jurisprudence is characterized by essentially ad hoc, factual inquiries designed to allow careful examination and weighing of all circumstances); *Yee v. Escondido*, 503 U.S. 519, 523 (1992) (regulatory takings cases necessarily entail "complex factual assessments of the purposes and economic effects of government actions"); *Penn Central*, 438 U.S. at 124 (takings analyses are "essentially ad hoc, factual inquiries"); *Palazzolo* at 633, 634-45 (The outcome depends largely upon the particular circumstances of the case. No one factor is "talismanic" under *Penn Central*; "the temptation to adopt what amount to per se rules in either direction must be resisted.") (O'CONNOR, J., concurring).

All this falls by the wayside because the court pinpoints the taking at the moment the sale was disapproved. After that, nothing matters, notwithstanding that Acceptance is dispossessed of its portfolio of crop insurance, and the RMA assumes control of the policies, after the disapproval of the sale. In this way, perhaps the most telling and critical parts of the story are rendered irrelevant as far as the Federal Circuit is concerned. This result is counterintuitive at the least.

The pinpoint doctrine, as this case shows, has the potential to divert a court from the necessity of grappling with the facts in a comprehensive, realistic way. It also seems inevitably fated to constrict the range and variety of compensable takings even where the loss, as here, is total and concrete. Indeed, these propositions seem proved by the court's opinion itself. After finding the denial of the sale to be the point at which any taking had to have occurred, the court then blithely concludes that Acceptance could not have suffered a physical taking of its crop insurance business because Acceptance, through its ownership of American Growers, continued to possess the crop insurance policy portfolio after that point. App. 19a, 583 F.3d at 858-859. Well, indeed, that was true – for a moment. But, as was fully anticipated, within hours after the rejection by RMA, the NDOI seized American Growers, and then in due course the RMA itself asserted dominion and control of the redistribution of the crop insurance policies to other companies. Viewed as an unbroken chain of events, which it was, this certainly appears to be a taking. The Circuit Court's opinion is entirely inadequate to convincingly establish that it was not.

Regulatory takings by their nature can be complicated and often take place in complex settings. The Federal Circuit's hyperformalistic doctrine does not promote the practical realism that this Court has consistently said should prevail in the analysis of regulatory takings. This Court should grant the writ in order to address the Federal Circuit's doctrine holding that a taking cannot result from the sum of a series of interconnected events.

CONCLUSION

The Federal Circuit's doctrines that a fundamental property right vanishes when one enters a regulated industry in which the right can be infringed in some circumstances and that a taking cannot properly be found in the sum of a series of events but must be pinpointed to a single governmental act, reveal a pronounced drift by that Court toward black letter rules that are neither correct nor consonant with this Court's flexible, realistic, weighing and balancing approach. If the Federal Circuit's approach to these questions is not corrected, the effect on persons participating in regulated industries could be a profound narrowing of protected property rights and cognizable takings claims. This case therefore is worthy of certiorari. For these reasons, this Court should grant the writ in order to address the validity and direction of the Federal Circuit's reasoning in regulated industry takings cases, as exemplified in the case presented.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals for the Federal Circuit

2009-5015

[Decided October 1, 2009]

ACCEPTANCE INSURANCE COMPANIES, INC.,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in case No. 03-CV-2794, Judge Thomas C. Wheeler.

Lewis S. Wiener, Sutherland Asbill & Brennan LLP, of Washington, DC, argued for plaintiff-appellant. Of counsel were Ronald Massumi and G. Brendan Ballard; and Patrick B. Griffin, Kutak Rock LLP, of Omaha, Nebraska.

Michael N. O'Connell, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for

defendant-Appellee. With him on the brief were Michael F. Hertz, Acting Assistant Attorney General, Jeanne E. Davidson, Director, and Mark A. Melnick, Assistant Director.

DECIDED: October 1, 2009

Before RADER, PLAGER, and SCHALL, Circuit Judges.

SCHALL, Circuit Judge.

Acceptance Insurance Companies, Inc. ("Acceptance") seeks reversal of the decision of the United States Court of Federal Claims that dismissed its claim for a compensable taking under the Fifth Amendment. Acceptance Ins. Cos. v. United States, 84 Fed. Cl. 111 (2008) ("Dismissal Order"). Acceptance brought suit alleging that, when the Risk Management Agency ("RMA"), a component of the Department of Agriculture, declined to approve a proposed sale of certain crop insurance assets to Rain and Hail LLC ("Rain & Hail"), the government rendered those assets valueless and, consequently, effected a categorical taking in violation of the Fifth Amendment. The Court of Federal Claims dismissed Acceptance's takings claim pursuant to RCFC 12(b)(6) for two reasons. Id. at 120. First, the court held that Acceptance had not alleged a legally cognizable property interest for purposes of the Fifth Amendment. Id. at 115–17. Second, the court held that, even if there was a legally cognizable property interest, Acceptance's claim was precluded under the line of cases following the Supreme Court's decision in Omnia Commercial Co. v.

United States, 261 U.S. 502 (1923). See Dismissal Order, 84 Fed. Cl. at 117–20. Because the Court of Federal Claims did not err in holding that Acceptance had failed to allege a legally cognizable property interest for Fifth Amendment purposes, we affirm.

BACKGROUND

I.

Our decision in Acceptance Insurance Cos. v. United States, 503 F.3d 1328 (Fed. Cir. 2007) ("Remand Decision"), which is discussed below, sets forth most of the pertinent facts. Additional facts recited herein are drawn from Acceptance's First Amended Complaint ("Compl."). See, e.g., Papasan v. Allain, 478 U.S. 265, 283–86 (1986) (stating that courts must accept the well-pleaded facts in the complaint as true when reviewing a dismissal for failure to state a claim); Cambridge v. United States, 558 F.3d 1331, 1335 (Fed. Cir. 2009) (looking to the well-pleaded facts in the complaint).

The Federal Crop Insurance Corporation ("FCIC") is a wholly-owned government corporation within the Department of Agriculture, established to regulate the crop insurance industry. Federal Crop Insurance Act, 7 U.S.C. §§ 1501, et seq. ("FCIA"); see Remand Decision, 503 F.3d at 1330. Private insurance companies offer crop insurance and are then reinsured (and regulated) by the FCIC. See Remand Decision, 503 F.3d at 1330. When a private insurance provider is eligible for reinsurance through the FCIC, the insurance provider and the FCIC enter into a Standard Reinsurance Agreement ("SRA"), pursuant to which the policies issued by the private insurance

provider to producers of agricultural commodities are reinsured. Id.; Compl. ¶ 6. See generally 7 U.S.C. § 1508 (outlining the considerations and requirements that govern crop reinsurance). The RMA is an agency within the Department of Agriculture whose purpose is to supervise the FCIC. See 7 U.S.C. § 6933. Its responsibilities include the "[a]dministration and oversight of all aspects . . . of all programs authorized under the [FCIA]" and "any other functions as the Secretary considers appropriate." See id.; Remand Decision, 503 F.3d at 1330 & n.2. Among other things, the RMA has the authority to approve or disapprove certain transactions that affect the FCIC, such as transactions concerning insurance policies that are governed by SRAs. See, e.g., 7 U.S.C. §§ 1508(h), (k); 7 C.F.R. §§ 400.703–.706 (providing that the RMA will review submissions pertaining to provisions of insurance policies); Compl. ¶ 4.[1]

Acceptance is a publicly traded insurance holding company. At the time relevant to this case, one of its holdings was American Growers Insurance Co. ("American Growers"), a corporation organized under the laws of Nebraska. American Growers provided crop insurance policies that were reinsured pursuant to the federal crop insurance program and, as such, were regulated by the FCIC/RMA.[2] See Compl. ¶¶ 6–8, 13.

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[1] We note that, for purposes of this appeal, the parties do not contest whether the RMA acted within its authority when it rejected the particular transaction at issue, the proposed sale to Rain & Hail.

[2] Neither Acceptance nor the government contends that the FCIC and the RMA cannot be considered as one for the purposes of this appeal.

American Growers' reinsurance relationships were governed by SRAs with the FCIC. See id. ¶ 6. The company therefore was required to comply with certain coverage levels, prices, and premium rates determined by the FCIC. See id. ¶ 8. Because American Growers was organized under the laws of Nebraska, it also was regulated by the Nebraska Department of Insurance ("NDOI"). See id. ¶ 7.

In November of 2002, American Growers disclosed that it had suffered a $130 million loss, causing its policyholder surplus to fall below mandated levels.[3] Acceptance's Br. 4. Subsequently, on November 18, 2002, Acceptance entered into a non-binding letter of intent with Rain & Hail, another company in the crop insurance business. Under the letter of intent, the parties contemplated that Rain & Hail would purchase the crop insurance portfolio serviced by American Growers. See Compl. ¶¶ 9–11; Remand Decision, 503 F.3d at 1330–31. According to the letter of intent, Rain & Hail proposed to purchase approximately 360,000 of American Growers' insurance policies for $21.5 million. See Compl. ¶¶ 10, 12. Acceptance states that, "[b]ecause the insurance assets to be purchased by Rain and Hail were reinsured by the FCIC and [were] subject to the FCIC's general oversight authority over the crop insurance industry, the transaction between Acceptance and Rain & Hail was subject to approval by the RMA." Compl. ¶ 13; see Remand Decision, 503 F.3d at 1330–31. The Administrator of the RMA, however, rejected the proposed sale. According to

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[3] Policyholder surplus refers to the amount of an insurance company's assets, in excess of its obligations, that could be used to pay policyholders for insured losses.

Acceptance, this was because the Administrator determined the sale would be "detrimental" to the interests of farmers and taxpayers. See Compl. ¶¶ 15–16.

On November 22, 2002, the RMA "ordered American Growers to cease and desist [from] marketing and selling . . . any new insurance contracts under its reinsurance agreements with the FCIC." Compl. ¶ 18; see Remand Decision, 503 F.3d at 1330–31. In addition, the RMA notified American Growers that the FCIC would not reinsure any new insurance contracts for it. See Remand Decision, 503 F.3d at 1330–31. Soon thereafter, as a result of American Growers' poor financial condition, the NDOI placed the company under supervision and in statutory liquidation. See id. at 1331. Acceptance contends that the RMA then took control of the liquidation and redistributed a portion of American Growers' policies to other crop insurance companies. See Remand Decision, 503 F.3d at 1331. Acceptance received no compensation for the policies that the RMA redistributed. Acceptance alleges that these actions, in concert, effectively put American Growers out of business and rendered Acceptance's property (its interest in American Growers) valueless. Compl. ¶¶ 18, 19.

II.

In due course, Acceptance filed suit in the Court of Federal Claims, alleging that "[w]hen the RMA, acting as agent of the United States, rejected the proposed Rain and Hail/Acceptance transaction . . ., it effected a taking of Acceptance's property, namely certain of Acceptance's assets, which were to be sold to Rain and

Hail, for public use." Compl. ¶ 24. As explained in the Remand Decision, the government responded with a motion to dismiss for lack of jurisdiction, arguing that 7 U.S.C. § 1506(d) granted exclusive jurisdiction to the district courts over all suits against the FCIC. Remand Decision, 503 F.3d at 1331. Eventually, the Court of Federal Claims granted the government's motion to dismiss for lack of jurisdiction and transferred the case to the United States District Court for the District of Nebraska. Id. at 1331–32; see Acceptance Ins. Co. v. United States, 72 Fed. Cl. 299 (2006). However, on appeal of the district court's denial of Acceptance's motion to retransfer to the Court of Federal Claims, we held that, while 7 U.S.C. § 1506(d) provides exclusive jurisdiction in the district courts for suits against the FCIC, it does not divest the Court of Federal Claims of jurisdiction over a takings claim brought against the United States. See Remand Decision, 503 F.3d at 1338–39. Following our decision, Acceptance's action was returned to the Court of Federal Claims.

With the case back in the Court of Federal Claims, the government filed another motion to dismiss, but this time for failure to state a claim under RCFC 12(b)(6). On September 25, 2008, the court granted the government's motion and dismissed Acceptance's takings claim. Dismissal Order, 84 Fed. Cl. at 112. The court did so for two reasons. First, relying primarily on the rationale in cases such as Mitchell Arms, Inc. v. United States, 7 F.3d 212 (Fed. Cir. 1993), it concluded that Acceptance had not alleged a legally cognizable property interest for purposes of the Fifth Amendment. Dismissal Order, 84 Fed. Cl. at 115–17. Despite Acceptance's arguments that the property interest taken by the government was American

Growers' tangible insurance portfolio, the court identified the property interest that Acceptance had alleged was taken as its "interest in selling its property to Rain and Hail." Id. at 116. In characterizing the property interest this way, the court noted that Acceptance's complaint focused on the RMA's rejection of the proposed sale as the alleged taking and that, following the RMA's rejection of the sale, Acceptance still "retained possession of the insurance portfolio at issue." Id. In further support of its conclusion that Acceptance had not alleged a cognizable property interest, the court noted that Acceptance had voluntarily entered into an area of pervasive government regulation and that any alleged property interest was dependent on the pertinent regulations. Id. at 116–17.

As an alternative rationale for dismissing Acceptance's claim, the court held that, even assuming the existence of a cognizable property interest, the property interest, at most, was "a letter of intent to enter into an agreement [and not even] an actual contract." Dismissal Order, 84 Fed. Cl. at 119. Starting from that premise, the court ruled that the Omnia Commercial, 262 U.S. at 508–513, line of cases—holding that a viable taking does not occur when the government merely causes the loss of benefits of a contract or simply frustrates business expectations—precluded the "taking" of that interest. See Dismissal Order, 84 Fed. Cl. at 117–120. Acceptance has timely appealed to this court. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

I.

As noted, the Court of Federal Claims dismissed Acceptance's takings claim on the pleadings pursuant to RCFC 12(b)(6). In order to avoid dismissal for failure to state a claim, a complaint must allege facts "plausibly suggesting (not merely consistent with)" a showing of entitlement to relief. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007); Cambridge, 558 F.3d at 1335. At the same time, a court is "not bound to accept as true a legal conclusion couched as a factual allegation." Twombly, 550 U.S. at 555 (quoting Papasan, 478 U.S. at 286). "The question of whether a complaint was properly dismissed for failure to state a claim upon which relief could be granted is one of law, which we review independently." Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States, 48 F.3d 1166, 1170 (Fed. Cir. 1995).

The Fifth Amendment to the United States Constitution proscribes the taking of private property "for public use, without just compensation." U.S. Const. V, cl. 4. "Real property, tangible property, and intangible property, all may be the subject of takings claims." Conti v. United States, 291 F.3d 1363, 1338–39 (Fed. Cir. 2002) (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992), Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1003–04 (1984), and Andrus v. Allard, 444 U.S. 51, 65 (1979)).

A "taking" may occur either by physical invasion or by regulation. See, e.g., Lucas, 505 U.S. at 1014–15. The Supreme Court has long recognized that "if regulation goes too far it will be recognized as a

taking." Penn. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); see, e.g., Lucas, 505 U.S. at 1014–19; Am. Pelagic Fishing Co. v. United States, 379 F.3d 1363, 1371 (Fed. Cir. 2004); Maritrans Inc. v. United States, 342 F.3d 1344, 1351 (Fed. Cir. 2003); Conti, 291 F.3d at 1339. This case concerns an alleged regulatory taking.

When evaluating whether governmental action constitutes a taking without just compensation, a court employs a two-part test. First, the court determines whether the claimant has identified a cognizable Fifth Amendment property interest that is asserted to be the subject of the taking. Second, if the court concludes that a cognizable property interest exists, it determines whether that property interest was "taken." See, e.g., Palmyra Pac. Seafoods, L.L.C. v. United States, 561 F.3d 1361, 1364 (Fed. Cir. 2009); Air Pegasus of D.C., Inc. v. United States, 424 F.3d 1206, 1212–13 (Fed. Cir. 2005); Am. Pelagic Fishing, 379 F.3d at 1372; Conti, 291 F.3d at 1339. "[W]e do not reach this second step without first identifying a cognizable property interest." Air Pegasus, 424 F.3d at 1213; see, e.g., Am. Pelagic Fishing, 379 F.3d at 1372.

II.

A.

On appeal, Acceptance goes to some length to explain its takings claim. It states that, "as a direct consequence of the RMA's rejection of the sale of assets to Rain & Hail," it "lost the entirety of the crop insurance business it conducted through its wholly-owned crop insurance subsidiary, American Growers, including a large and valuable portfolio of in-force

policies." Acceptance's Br. 8. Amplifying, Acceptance points out that after the RMA refused to approve the sale of American Growers, the NDOI seized control of the company's policies. Thereafter, according to Acceptance, the RMA controlled the disposition and redistribution of the American Growers insurance portfolio. Acceptance argues that these actions collectively constituted a categorical taking.

Contending that the Court of Federal Claims' basis for dismissal was incorrect, Acceptance argues that the court incorrectly characterized the asserted property interest as only involving "the taking of a contract or a proposed sale." In Acceptance's view, this characterization was incorrect because it alleged the taking of neither a contract nor a proposed sale, but instead consistently emphasized that the government took actual property—namely, the American Growers crop insurance business. Thus, Acceptance urges, because the government took actual property, it (Acceptance) did assert a cognizable property interest, and therefore its takings claim is distinguishable from those asserted in cases such as Mitchell Arms, 7 F.3d 212.

Acceptance points out that in Mitchell Arms, because the plaintiff actually retained possession of its property—i.e., the firearms at issue—the "only affected interest was the right to sell imported assault weapons in the United States, which existed only by virtue of a revocable federal permit to do so." Acceptance's Br. 11–12. In contrast, according to Acceptance, it is not complaining of the loss of the right in a particular use of its property—i.e., the right to sell its property—but rather the actual loss of the property itself—i.e., the entire crop insurance business of American Growers.

Responding, the government argues that the Court of Federal Claims correctly found no cognizable property interest. The government points out that American Growers' insurance policies were at all times subject to, and governed by, the pertinent FCIC regulatory scheme, which provides the RMA with the authority to reject certain proposed transactions. The government argues that, as a result, the court correctly ruled that no taking could occur because the "taking alleged relates to a right to exclude" that Acceptance never possessed—namely, "the right to exclude the Government from reviewing sales of crop insurance policies." Gov't Br. 22–23. Additionally, according to the government, the court correctly held that, although the government may have precluded Acceptance from realizing a business expectation by preventing the proposed sale, that expectation was entirely dependent upon the RMA's approval of the sale.[4]

B.

As the first step in our analysis, we must identify what, if anything, was the subject of the alleged taking. See Branch v. United States, 69 F.3d 1571, 1575 (Fed. Cir. 1995) ("In analyzing a takings claim, a court must first determine what was taken."). As just noted, in its briefing on appeal Acceptance characterizes the alleged taking as consisting of several distinct actions viewed in concert. We have

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[4] Both parties make arguments about whether the Court of Federal Claims correctly dismissed Acceptance's claim based on the Omnia Commercial line of cases. Because we hold that Acceptance failed to assert a cognizable property interest, we do not reach those arguments.

stated, however, that such a "characterization . . . is too broad" because "it does not pinpoint what step in the sequence of events . . . constituted conduct that the government could not engage in without paying compensation." Id. (rejecting the plaintiff's characterization of the alleged "taking," which consisted of several distinct events); see, e.g., Kitt v. United States, 277 F.3d 1330, 1336 (Fed. Cir. 2002) (stating that analysis of a takings claim requires identifying the precise governmental action that is the subject of the claim); Creppel v. United States, 41 F.3d 627, 634 (Fed. Cir. 1994) ("[T]his court must determine when the events fixing any potential Government liability [for a taking] occurred."). Notwithstanding the arguments in its brief, Acceptance's First Amended Complaint and statements to the court pinpoint the precise action that it contends constituted conduct the government could not engage in without paying compensation. That action was the RMA's rejection of the proposed sale to Rain & Hail of American Growers' portfolio of insurance policies.

Looking to the complaint, as we must when reviewing a dismissal pursuant to RCFC 12(b)(6), Acceptance consistently focuses on the RMA's rejection of the proposed sale. See generally Compl. ¶¶ 21–30. Specifically, Acceptance states: "The RMA exercised its regulatory authority in rejecting the proposed Rain and Hail/Acceptance transaction, rendering valueless American Growers' insurance assets . . . .," Compl. ¶ 21; "Acceptance held a reasonable investment backed expectation that the RMA would approve the proposed Rain and Hail/Acceptance transaction," id. ¶ 23. Moreover, in the paragraph that summarizes its takings claim, Acceptance asserts that "[w]hen the RMA . . . rejected the proposed Rain and

Hail/Acceptance transaction . . . it effected a taking of Acceptance's property." Id. ¶ 24. Indeed, except for a solitary paragraph in the "Facts" section, which merely provides additional background about the RMA's later actions, see id. ¶ 18, Acceptance's First Amended Complaint focuses exclusively on the RMA's rejection of the proposed sale to Rain & Hail as the alleged taking.

Moreover, at oral argument—not only in this appeal, but in the previous appeal relating to the same takings claim, see Remand Decision—Acceptance made it clear that it alleges a taking occurred when the RMA rejected the proposed sale. In the previous appeal, because the court was skeptical about whether Acceptance had in fact brought a takings claim, the court asked "[c]an you help me identify the taking here?" See Oral Arg., Aug. 8, 2007, 1:01–1:30, available at http://oralarguments.cafc.uscourts.gov/mp3/2007-1127.mp3. Responding, Acceptance stated that it "asserts a Fifth Amendment takings claim based on the government's action in preventing Acceptance from selling its in-force crop insurance business and other insurance related assets . . . ." Id. (emphasis added). When asked to be more specific, Acceptance reiterated that the alleged taking occurred "[w]hen [it] wanted to sell its in-force insurance policies to Rain & Hail," but was prevented from doing so by the RMA. See id. at 2:07–14. In fact, Acceptance pinpointed the RMA's action as the alleged taking two other times during the same oral argument. See id. at 3:34–46 ("As a consequence of the RMA . . . saying [it] would not authorize or approve of the requested transaction."); id. at 4:40–5:05 ("It is the regulatory action of denying the sale . . . ."). At the same time, Acceptance was consistent during oral argument in

this appeal, emphasizing that a taking allegedly occurred when the RMA rejected the proposed sale of American Growers' portfolio. See, e.g., Oral Arg., Aug. 5, 2009, 6:04–6:16, available at http://oralarguments.cafc.uscourts.gov/mp3/2009-5015.mp3 ("The taking is the frustration of saying we will not approve the sale, ..."); id. at 7:45–8:00 ("Court: They did not take that property. Acceptance: They certainly did your Honor. . . . By saying to Acceptance, you may not sell those policies to Rain & Hail.").[5]

In short, the action that allegedly constituted conduct that the government could not engage in without paying compensation was the RMA's rejection of the proposed sale to Rain & Hail of American Growers' insurance policy portfolio. We therefore must determine what interest, if any, was affected when that action occurred and whether Acceptance possessed a legally cognizable Fifth Amendment property right in that interest.

C.

The Court of Federal Claims determined that the interest that was affected by the RMA's action was Acceptance's interest in selling American Growers' crop insurance policies to Rain & Hail. See Dismissal Order, 84 Fed. Cl. at 116. It also determined that such interest was not a legally cognizable property interest for purposes of the Fifth Amendment. See id. at

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[5] Identifying the alleged "taking" as the RMA's rejection of the proposed sale is consistent with Acceptance's $21.5 million request for damages, which was the value of the proposed sale rejected by the RMA. See Compl. ¶¶ 10, 12, 27.

116–17. We agree with the court on both counts. The first point requires little discussion. Plainly, what the RMA's action affected was Acceptance's ability to freely sell American Growers' insurance portfolio to Rain & Hail. The critical question is whether this was a legally cognizable property interest.

It is well settled that "'existing rules and understandings' and 'background principles' derived from an independent source, such as state, federal, or common law, define the dimensions of the requisite property rights for purposes of establishing a cognizable taking." Conti, 291 F.3d at 1340; see Lucas, 505 U.S. at 1029–30; Am. Pelagic Fishing, 379 F.3d at 1376 ("We determine whether an asserted right is one of the rights in the bundle of sticks of property rights that inheres in a res by looking to 'existing rules or understandings' and 'background principles' derived from an independent source such as state, federal, or common law." (quoting Lucas, 505 U.S. at 1030)). These existing rules often define "the citizen's relation to the physical thing," which may include the right to possess, use, and dispose of the property at issue. See, e.g., United States v. Gen. Motors Corp., 323 U.S. 373, 378 (1945) (explaining that the Fifth Amendment is not concerned "with other collateral interests which may be incident to . . . ownership"); Conti, 291 F.3d at 1340.

Under the "background principles" and rules existing when Acceptance entered into the crop insurance business, Acceptance could not freely transfer the policies at issue. Rather, such action was subject to the RMA's approval. Therefore, Acceptance did not possess a cognizable Fifth Amendment property interest in freely selling American Growers'

portfolio of insurance policies to Rain & Hail. See, e.g., Am. Pelagic Fishing, 379 F.3d at 1381 ("Because the right to use . . . was not inherent in its ownership of the [property], [but instead was totally dependent upon the regulatory scheme,] American Pelagic did not suffer the loss of a property interest . . . when its . . . permits were revoked."); Conti, 291 F.3d at 1342 (affirming dismissal for failure to state a claim because "[t]he absence of crucial indicia of a property right, [such as the right to sell, assign, or otherwise transfer,] coupled with the government's irrefutable retention of the right to suspend, revoke, or modify [the plaintiff's] permit, compels the conclusion that" there was no cognizable property right).

As a general matter, we have no reason to assume that an insurance company, such as American Growers, does not have a property right in the contracts of insurance (the policies) it sells. Similarly, we have no reason to assume that such property right does not include the common law right to sell or assign its interest in the contracts. However, be that as it may, by voluntarily entering into the federally regulated crop insurance business, Acceptance relinquished its right to freely transfer American Growers' insurance policies, in exchange for the benefits of the crop insurance program, such as being reinsured by the government for certain losses. See, e.g., Am. Pelagic Fishing, 379 F.3d at 1379 ("Because it was already in place by the time [the plaintiff] purchased the Atlantic Star, the [regulatory scheme] was an 'existing rule' or 'background principle [ ]' of federal law that inhered in [the plaintiff's] title to the vessel." (quoting Lucas, 505 U.S. at 1029–30)). Accordingly, because the RMA had the authority to deny the sale of the policies at issue, Acceptance,

through American Growers, did not possess the unfettered right to sell or otherwise transfer the policies, thus precluding the existence of a cognizable property interest. See, e.g., Am. Pelagic Fishing, 379 F.3d at 1374 (rejecting an alleged property interest in permits and authorization letters because the government retained the right to deny or sanction those permits and letters); Conti, 291 F.3d at 1341–42 (finding no cognizable property interest in a fishing permit because the plaintiff did not have "[t]he right[ ] to sell, assign, or otherwise transfer" the permit and "the government at all times retained the right to revoke, suspend, or modify the permit"). In other words, when the RMA decided to disapprove of the sale to Rain & Hail, there was no right to freely alienate the policies extant in Acceptance/American Growers with which that decision interfered. Essentially, Acceptance asks us to recognize a cognizable property right in a decision by the RMA not to exercise its authority to reject the sale of insurance policies subject to the crop insurance regulatory scheme. We decline to do that. See Conti, 291 F.3d at 1342 n.5 (finding no cognizable property right "in the government's discretionary decision not to exercise its explicitly granted authority to revoke, suspend, or modify the permit" (citing Bowen v. Public Agencies Opposed to Soc. Sec. Entrapment, 447 U.S. 41, 55 (1986))). Even assuming that the RMA had previously approved of other similar transactions, any expectation that the RMA would approve of future transactions does not rise to the level of a cognizable property interest because simply "enjoying a use of . . . property that the government chose not to disturb," although could have, does "not equate to a cognizable property interest." Am. Pelagic Fishing, 379 F.3d at 1377 ("[T]here is a distinction between simply not being disturbed in the

particular use of one's property and having the right to that use of the property. Clearly, in order for there to be a cognizable property interest sufficient to support a takings claim, the latter must be true.").

Acceptance argues, however, that because its physical property—specifically, American Growers—was actually "taken," it did suffer a taking. According to Acceptance, American Pelagic Fishing, Conti, and Mitchell Arms are therefore distinguishable. In each of those cases, Acceptance urges, the plaintiff retained physical possession of the property in question and was only prevented from using the property in a particular manner—e.g., selling the property. We disagree. When the RMA rejected the proposed sale of American Growers' policies to Rain & Hail, the government did not actually "take" American Growers. Rather, Acceptance still maintained possession of American Growers and held the same property interest as it had prior to the RMA's rejection—a property interest that included having American Growers subject to the coverage and capital requirements of the pertinent crop insurance regulations. Put another way, when the RMA rejected the proposed sale, Acceptance possessed no more or no less of a property interest in American Growers than it did prior to the RMA's rejection.

In sum, contrary to Acceptance's arguments, when the RMA rejected the proposed sale, it did not actually take American Growers' insurance policy portfolio. Rather, Acceptance, through its ownership of American Growers, retained possession of the polices, but was barred from selling them to a particular buyer, Rain & Hail. As a result, it was prevented from realizing a business expectation. Under these

circumstances, Acceptance's takings claim is not distinguishable from our decisions in American Pelagic Fishing, Conti, and Mitchell Arms, where physical property was retained but a business expectation was frustrated.

CONCLUSION

For the foregoing reasons, Acceptance did not have a cognizable property interest for Fifth Amendment purposes in the ability to freely transfer American Growers' portfolio of insurance policies. Thus, there was no cognizable property interest that could be "taken" when the RMA rejected the proposed sale to Rain & Hail. We thus affirm the decision of the Court of Federal Claims that dismissed Acceptance's takings claim pursuant to RCFC 12(b)(6). Because we have ruled that Acceptance failed to allege a cognizable property interest, we do not need to address the parties' arguments relating to the Court of Federal Claims' alternative rationale under the Omnia Commercial line of cases for dismissing Acceptance's claim.

AFFIRMED

APPENDIX B

In the United States Court of Federal Claims

No. 03-2794

(Filed: September 25, 2008)

ACCEPTANCE INSURANCE COMPANIES INC.,	)
Plaintiff,	)
v.	)
THE UNITED STATES,	)
Defendant.	)

Fifth Amendment; Regulatory Taking Claim; Proposed Sale of Crop Insurance Policies From One Private Party to Another; No Legally Cognizable Property Interest; Omnia Line of Cases; Rule 12(b)(6).

Lewis S. Wiener, with whom were *Ronald R. Massumi* and *G. Brendan Ballard,* Sutherland, Asbill & Brennan LLP, Washington, D.C., *Patrick Griffin,* Kutak Rock, LLP, Omaha, Nebraska, Of Counsel, for Plaintiff.

Michael N. O'Connell, with whom were *Gregory G. Katsas*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Mark A. Melnick*, Assistant Director, United States Department of Justice, Commercial Litigation Branch, Civil Division, Washington, D.C., *Kimberley E. Arrigo*, U.S. Department of Agriculture, Of Counsel, for Defendant.

OPINION AND ORDER

WHEELER, Judge.

In this Fifth Amendment takings case, Plaintiff Acceptance Insurance Companies, Inc. ("Acceptance") seeks just compensation for damages resulting from the actions of the Risk Management Agency ("RMA") in blocking the proposed sale of certain crop insurance policies and other tangible and intangible insurance assets to a private third party purchaser. This case is before the Court on Defendant's motion under Rule 12(b)(6) of the Court of Federal Claims ("RCFC") to dismiss for failure to state a claim upon which relief may be granted. For the reasons stated below, the Court finds that Plaintiff has failed to state an actionable claim, and accordingly, Defendant's motion to dismiss is GRANTED.

Background[1]

Acceptance, a publicly-traded insurance holding company based in Nebraska, alleges that the United States, through the regulatory actions of the RMA,[2] effected a taking of Plaintiff's property by blocking the proposed sale of certain of its crop insurance assets to a private third party purchaser. Am. Compl. at ¶ 24.

During the time relevant to this dispute, Acceptance held a wholly-owned subsidiary, American Growers Insurance Company ("American Growers"), through which Acceptance engaged in the crop insurance and property and casualty insurance businesses. See id. at ¶ 7. American Growers was in the business of underwriting a substantial number of insurance policies within the federal crop insurance

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[1] The facts recited herein are taken from the parties' briefs on Defendant's April 30, 2008 supplemental motion to dismiss and Plaintiff's amended complaint, filed on April 11, 2005. The Court is satisfied that the material facts necessary to decide the issue presented are not in dispute.

[2] Congress created the RMA within the U.S. Department of Agriculture ("USDA") in 1996 to supervise the already existing Federal Crop Insurance Corporation ("FCIC"). See 7 U.S.C. § 6933 (2006). Congress created the FCIC in 1938 through the Federal Crop Insurance Act ("FCIA"), 7 U.S.C. §§ 1501 et seq., to regulate and re-insure the nation's crop insurance industry, by providing reinsurance to private insurers offering crop insurance to farmers. See 7 U.S.C. § 1503 (2006); Compl. at ¶¶ 4, 6. The reinsurance relationship between the FCIC and private crop insurance companies is governed by a contract referred to as the Standard Reinsurance Agreement ("SRA"). Compl. at ¶ 6. The FCIC is a wholly-owned government corporation that, like the RMA, exists within the USDA. See Tex. Peanut Farmers v. United States, 409 F.3d 1370, 1372 (Fed. Cir. 2005).

program, as well as crop insurance policies pursuant to state insurance laws that are not a part of the federal crop insurance program. Id. As a private insurance company reinsured by the FCIC, American Growers was regulated by the FCIC and was required to, among other things, use the coverage levels, prices, premium rates, and transitional yields determined by the FCIC. Id. at ¶ 8.

In November 2002, American Growers announced that it had suffered a $130 million loss in the third quarter. Pl.'s Resp. at 3, June 20, 2008. As a result, American Growers' policyholder surplus fell far below the minimum amount required by the state insurance regulator, the Nebraska Department of Insurance ("NDOI"). Id. In order to remedy this situation, Acceptance, on November 18, 2002, entered into a non-binding letter of intent with Rain and Hail, LLC ("Rain and Hail") detailing the terms of a proposed sale of most of Acceptance's "crop insurance assets." Am. Compl. at ¶ 10. Although structured as a sale of assets, the proposed transaction was in fact a sale by Acceptance of American Growers. Id. at ¶ 11. Generally, Rain and Hail agreed to purchase this property from Acceptance for a fair market value determined to be not less than $21.5 million. Id. at ¶¶ 10, 12.

After Acceptance and Rain and Hail executed the letter of intent, on or about November 20, 2002, Rain and Hail's president and other representatives met with RMA officials to discuss the terms of the proposed sale. Id. at ¶ 14. Shortly thereafter, however, the deal began to fall apart. Plaintiff alleges that on November 22, 2002, RMA administrator Ross Davidson advised Acceptance and Rain and Hail that the RMA would not

approve the proposed transaction. Id. at ¶ 15. Plaintiff asserts that Mr. Davidson rejected the transaction because it would be detrimental to the interests of farmers and taxpayers. Id. at ¶ 16.

After the RMA's rejection of the sale on the terms proposed, Rain and Hail ultimately determined not to purchase American Growers' policies. Plaintiff alleges that absent the exercise of Mr. Davidson's regulatory authority to reject the proposed sale, the transaction would have taken place and Acceptance would have received fair market value for its property. Id. at ¶ 17. Thus, according to Plaintiff, the RMA essentially rendered Acceptance's property worthless through its action in rejecting the proposed sale. Id. at ¶ 19.

Moreover, on the same day as the collapse of the Rain and Hail deal, and in view of American Growers' already precarious financial position, the NDOI placed American Growers under supervision, freezing the business and prohibiting transfer of any crop insurance policies. Pl.'s Resp. at 4, June 20, 2008. The RMA continued to control the disposition of American Growers' crop insurance portfolio through its ultimate liquidation, subsequently transferring the crop insurance policies to other approved crop insurance providers, including Rain and Hail. Id. Acceptance received no compensation from the distribution of these policies. Id.

Acceptance filed its Fifth Amendment takings claim in this Court on December 12, 2003. The transfer of Acceptance's assets, accomplished by the RMA without compensation to Acceptance, as well as the RMA's exercise of control over the crop insurance polices, and its redistribution of the policies to other private crop

insurers, forms the basis of Plaintiff's regulatory takings claim. Id.

Defendant filed a motion to dismiss pursuant to RCFC 12(b)(1) or, in the alternative for summary judgment, which Senior Judge Robert H. Hodges denied on August 13, 2004. On February 10, 2006, Defendant filed a renewed motion to dismiss pursuant to RCFC 12(b)(1) or, in the alternative for summary judgment. Among other things, Defendant argued that Congress granted the United States district courts exclusive jurisdiction over suits challenging the RMA's actions concerning the FCIC. Def.'s Mot. To Dismiss at 11, Feb. 10, 2006. Following oral argument, this Court granted Defendant's motion and concluded that, because Congress withdrew this Court's Tucker Act jurisdiction over claims against the FCIC, the case should be transferred to a United States district court under 28 U.S.C. § 1631. Acceptance Ins. Cos., Inc. v. United States, 72 Fed. Cl. 299, 305 (2006). This Court transferred the case to the United States District Court for the District of Nebraska, which denied Plaintiff's motion to transfer the case back to this Court. Acceptance Ins. Cos., Inc. v. United States, No. 8:06CV609, 2006 WL 3538946, at *4 (D. Neb. Dec. 7, 2006). Plaintiff appealed and on October 2, 2007, the United States Court of Appeals for the Federal Circuit held that because Plaintiff's suit did not involve the FCIC, but rather was a suit against the United States, 7 U.S.C. § 1506(d) did not divest this Court of jurisdiction to hear the case. Acceptance Ins. Cos., Inc. v. United States, 503 F.3d 1328, 1338 (Fed. Cir. 2007). The Federal Circuit thus reversed the district court's denial of Plaintiff's motion for retransfer and instructed the district court to transfer the suit back to this Court. Id. at 1338-39. Defendant then filed the

present motion to dismiss on April 30, 2008. Briefing on Defendant's motion was completed on July 7, 2008, and the Court heard oral argument on July 17, 2008.

Discussion

A. RCFC 12(b)(6) Standard of Review

It is well-settled that a complaint should be dismissed under RCFC 12(b)(6) "when the facts asserted by the claimant do not entitle him to a legal remedy." Lindsay v. United States, 295 F.3d 1252, 1257 (Fed. Cir. 2002). When considering a motion to dismiss for failure to state a claim upon which relief may be granted, the Court "must accept as true all the factual allegations in the complaint, and [the Court] must indulge all reasonable inferences in favor of the non-movant." Sommers Oil Co. v. United States, 241 F.3d 1375, 1378 (Fed. Cir. 2001) (citations omitted); see also Huntleigh USA Corp. v. United States, 63 Fed. Cl. 440, 443 (2005). While detailed factual allegations in the complaint are not necessary, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do . . . ." Bell Atl. Corp. v. Twombly, 127 S.Ct. 1955, 1964-65 (2007) (citations omitted).

Under the Tucker Act, the Court of Federal Claims has exclusive jurisdiction to render judgment upon any claim against the United States for money damages in excess of $10,000 that is "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for

liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. 1491(a)(1) (2006). Thus, "a claim for just compensation under the Takings Clause must be brought to the Court of Federal Claims in the first instance, unless Congress had withdrawn the Tucker Act grant of jurisdiction in the relevant statute." E. Enters. v. Apfel, 524 U.S. 498, 520 (1998); Acceptance, 503 F.3d at 1336. "If there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the [Court of Federal Claims]." Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 12 (1990) (quoting United States v. Causby, 328 U.S. 256, 267 (1946)). A takings claim against the United States may be based on the acts of agents of the United States, if the authority to carry out those acts was validly conferred by Congress to the agents and if those acts are within the constitutional power of Congress. See Acceptance, 503 F.3d at 1337.

B. Takings Analysis

The Takings Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V, cl. 4. "The purpose of the takings clause is to prevent 'Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" Air Pegasus of D.C., Inc. v. United States, 424 F.3d 1206, 1212 (Fed. Cir. 2005) (quoting Penn Cent. Transp. Co. v. City of N.Y., 438 U.S. 104, 123 (1978)).

The Supreme Court has recognized two kinds of compensable takings: (1) actual takings, through the Government's physical invasion or appropriation of private property, or (2) regulatory takings, through

government regulations that unduly burden private property interests. See Huntleigh USA Corp. v. United States, 525 F.3d 1370, 1378 (Fed. Cir. 2008). In the present case, Plaintiff has alleged a regulatory taking. Pl.'s Resp. at 6-7, June 20, 2008 ("When the RMA prevented Acceptance from selling the book of business to Rain and Hail, thereby preventing Acceptance from realizing the value of the business, that act constituted a regulatory taking of a cognizable property interest.").

The Federal Circuit has "developed a two-part test for determining whether 'fairness and justice' require compensation for burdens imposed by a particular governmental action." Huntleigh, 525 F.3d at 1377. As the first step, the court must determine whether the claimant has established a legally cognizable property interest, for purposes of the Fifth Amendment. Id. (citing Am. Pelagic Fishing Co. v. United States, 379 F.3d 1363, 1372 (Fed. Cir. 2004)). "[O]nly persons with a valid property interest at the time of the taking are entitled to compensation." Id. (citing Wyatt v. United States, 271 F.3d 1090, 1096 (Fed. Cir. 2001)); see also Air Pegasus, 424 F.3d at 1215 ("[A] claimant seeking compensation from the government for an alleged taking of private party must, at a minimum, assert that *its* property interest was actually taken by the government action."); Yuba Natural Res., Inc. v. United States, 904 F.2d 1577, 1581 (Fed. Cir. 1990) ("It is a well settled principle of Fifth Amendment Taking law, however, that the measure of just compensation is the fair value of what was taken, and not the consequential damages the owner suffers as a result of the taking."). The Supreme Court has found the Takings Clause to encompass governmental encroachments on real property, personal property, and intangible property interests. See, e.g., Lucas v.

S.C. Coastal Council, 505 U.S. 1003, 1020 (1992) (government regulation restricting use of beachfront property); Andrus v. Allard, 444 U.S. 51, 65 (1979) (government regulation prohibiting sale of Indian artifacts containing the feathers of endangered birds); Ruckelshaus v. Monsanto Co., 467 U.S. 986,1003-04 (1984) (government regulation requiring public disclosure of trade secrets by applicants for pesticide registrations).

Once the court has identified a valid property interest, it must determine whether the government action at issue amounted to a compensable taking of that property interest. Huntleigh, 525 F.3d at 1378; Am. Pelagic Fishing, 379 F.3d at 1372. However, if the claimant fails to demonstrate the existence of a legally cognizable property interest, the court does not proceed with this second step. Air Pegasus, 424 F.3d at 1213.

1. Plaintiff Has Not Established a Legally Cognizable Property Interest.

With regard to the first inquiry, "the Constitution does not itself create or define the scope of 'property' interests protected by the Fifth Amendment." Air Pegasus, 424 F.3d at 1213. "Instead, 'existing rules and understandings' and 'background principles' derived from an independent source, such as state, federal, or common law, define the dimensions of the requisite property rights for purposes of establishing a cognizable taking." Id. (quoting Maritrans Inc. v. United States, 342 F.3d 1344, 1352 (Fed. Cir. 2003)). Although contracts, leases, and other agreements may be considered property within the meaning of the Fifth Amendment, the Government's appropriation of which

may trigger the resulting obligation to pay just compensation, "not every exercise of governmental power that interferes with, or frustrates, performance of a contract constitutes a compensable taking." Kearney & Trecker Corp. v. United States, 688 F.2d 780, 783 (Cl. Ct. 1982) (citing Lynch v. United States, 292 U.S. 571, 579 (1934) and Omnia Corp. v. United States, 261 U.S. 502, 510-11 (1923)).

To explain what constitutes a cognizable Fifth Amendment property interest, courts have distinguished between a plaintiff's actual property and its "collateral interest." See, e.g., Air Pegasus, 424 F.3d at 1215; Mitchell Arms, Inc. v. United States, 7 F.3d 212, 217 (Fed. Cir. 1993); Schooner Harbor Ventures, Inc. v. United States, 81 Fed. Cl. 404, 412-13 (2008). "The Fifth Amendment concerns itself solely with the 'property,' *i.e.* with the owner's relation as such to the physical thing and not with the other collateral interests which may be incident to his ownership." Mitchell Arms, 7 F.3d at 217 (quoting United States v. General Motors Corp., 323 U.S. 373, 378 (1945)).

In Mitchell Arms, the plaintiff asserted that the Government took its property when it revoked a permit which would allow the plaintiff to import semi-automatic rifles into the United States after plaintiff's purchase of the firearms. 7 F.3d at 213. Rejecting plaintiff's takings claim, the Federal Circuit declined to hold that plaintiff's investment-backed reliance on the issued import permits constituted "property" within the meaning of the Fifth Amendment. Id. at 215. Although the Government "took" from plaintiff the ability to realize an expectation in the ultimate market disposition of the rifles, this was a "collateral interest" incident to

plaintiff's ownership of the rifles. Id. at 217. Such property, the court held, is not protected by the Fifth Amendment, since plaintiff retained complete control over its property. Id. ("[Plaintiff] could have done anything it wished with the rifles, except import them into the United States in their original configuration.").

In Air Pegasus, the plaintiff alleged a regulatory taking of its heliport business following the Federal Aviation Administration's post-September 11 decision to ban all commercial air travel within 25 nautical miles of Washington, D.C., except at a few select locations. See 424 F.3d at 1209-10. The Federal Circuit rejected the plaintiff's takings claim, finding that the plaintiff did not have a cognizable property interest because it did not actually own any helicopters. Id. at 1215. The Federal Circuit added that the plaintiff's "economic injury [was] not the result of the government taking [its] property, but [was] the more attenuated result of the government's purported taking of other people's property." Id. This derivative injury, the Federal Circuit held, could "not form the basis for a viable takings claim." Id.

In Schooner, the plaintiff's claimed property interest consisted of its interest to sell its property to the Navy for the development of a housing project without conditions or additional financial burden. 81 Fed. Cl. at 412. Relying on the holdings in Mitchell Arms and Air Pegasus, the Court of Federal Claims found the plaintiff's interest to be collateral to its physical ownership in the property. Id. at 413. "Whereas, the right to alienate the property is a cognizable property interest, the right to sell the property to the government at a particular price and

without conditions is not a cognizable property interest which is protected by the Fifth Amendment." Id. at 414.

Here, Plaintiff has not demonstrated that it has a protected property right in its crop insurance business, as required for the Government's actions to constitute a compensable taking. Plaintiff asserts a present property interest in the insurance portfolio and associated assets that constituted Acceptance's crop insurance business, *i.e.* its book of crop insurance. Pl.'s Resp. at 3, 6, June 20, 2008. Plaintiff claims that its crop insurance business was the subject of government regulation when the RMA allegedly prevented Acceptance from selling the book of business to Rain and Hail, thereby preventing Acceptance from realizing the value of the business. Id. at 3, 6-7. This action, Acceptance argues, constituted a regulatory taking of a cognizable property interest. Id. at 6-7.

However, following the RMA's rejection of the Rain and Hail transaction, Plaintiff retained possession of the insurance portfolios at issue. In fact, the actions of the RMA, at best, interfered with Plaintiff's interest in selling its property to Rain and Hail under the terms of the proposed, non-binding agreement. The RMA did not interfere with the property itself. Despite the fact that Plaintiff was interested in selling its property to Rain and Hail, and certainly had the right to do so, this interest is not a compensable property right. Further, although Rain and Hail did sign a letter of intent to purchase Plaintiff's crop insurance assets, this letter was non-binding, and certainly does not equate to an actual contract between the parties. Thus, Acceptance's interest in completing its transaction with Rain and Hail without any involvement from the

Government must be characterized as a collateral interest that is not protected by the Fifth Amendment. Mitchell Arms, 7 F.3d at 217; Air Pegasus, 424 F.3d at 1215; Schooner, 81 Fed. Cl. at 413-14.

Moreover, when a plaintiff voluntarily enters into an area which, from the start, is subject to pervasive government control, its enforceable rights sufficient to support a takings claim against the United States are extinguished. See Mitchell Arms, 7 F.3d at 216; Air Pegasus of D.C., Inc. v. United States, 60 Fed. Cl. 448, 453-54 (2004) ("If a party voluntarily enters into an area that is subject to pervasive government control, then a property right that would justify compensation under the Takings Clause may not exist.") aff'd 424 F.3d 1206 (Fed. Cir. 2005). As the Federal Circuit has explained, "[t]he chief and one of the most valuable characteristics of the bundle of rights commonly called 'property' is 'the right to sole and exclusive possession – the right to *exclude* strangers, or for that matter friends, but especially the Government.'" Mitchell Arms, 7 F.3d at 215 (quoting Hendler v. United States, 952 F.2d 1364, 1374 (Fed. Cir. 1991)). Thus, "[t]he reason enforceable rights sufficient to support a taking[s] claim" cannot arise in such an area is that when a citizen voluntarily enters such an area, the citizen cannot be said to possess 'the right to exclude' because it is impossible for a citizen in an area subject to government control to possess this right." Id. (quoting Hendler, 952 F.2d at 1374).

Although mere participation in a heavily regulated environment does not bar a plaintiff from showing that it has a property interest compensable under the Fifth Amendment, "courts must consider whether the affected 'right of use' is dependent upon the regulatory

scheme or whether 'an independent or preexisting right of use under common law applies.'" Page v. United States, 51 Fed. Cl. 328, 339 (2001) (quoting Maritrans Inc. v. United States, 40 Fed. Cl. 790, 798 (1998)). If the interest was independent of the regulatory scheme, courts have found that a compensable taking has occurred. See, e.g., Cienega Gardens v. United States, 331 F.3d 1319, 1334 (Fed. Cir. 2003) (finding that federal statutes preventing the prepaying of federally subsidized mortgages were a taking of property despite heavy regulation of the federal housing program). In contrast, courts have found property interests to be dependent on a regulatory scheme when pervasive regulation exists in the area. See, e.g., Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment, 477 U.S. 41, 55 (1986) (holding no property interest existed where State of California voluntarily entered into national social security program for its employees and then was prevented from terminating its participation due to an act of Congress); Conti v. United States, 48 Fed. Cl. 532, 540 (2001), aff'd, 291 F.3d 1334 (Fed. Cir. 2002) (finding no property interest for fisherman whose permit was altered by a new regulation permitted under existing statutory scheme).

Acceptance acquired American Growers not long before the proposed transaction with Rain and Hail. By doing so, Acceptance voluntarily entered a regulatory scheme knowing that the FCIC retained its statutory authority to regulate private crop insurance companies, pursuant to 7 U.S.C. § 1501. Plaintiff cannot dispute that its claimed property interest, the book of crop insurance assets, is subject to the existing regulatory scheme for the crop reinsurance industry, as administered by the RMA. Thus, Plaintiff's property

interest cannot be said to be a property right protected under the Fifth Amendment takings clause. Mitchell Arms, 7 F.3d at 216; Air Pegasus, 60 Fed. Cl. at 455-57.

Plaintiff has failed to establish a legally cognizable property interest, precluding recovery under the Fifth Amendment. Huntleigh, 525 F.3d at 1377. Accordingly, the Court need not proceed with the second step in the takings analysis. Air Pegasus, 424 F.3d at 1213.

2. The Omnia Line of Cases Precludes Plaintiff's Claim.

Even assuming Plaintiff could establish a property interest in its crop insurance portfolio, the line of precedent commencing with Omnia Commercial Co., Inc. v. United States, 261 U.S. 502 (1923), also precludes Plaintiff's takings claim. As Defendant asserts in its motion, the Supreme Court, beginning with Omnia, has held that a compensable taking can never occur in cases where government actions caused the loss of a commercial sale from one private party to another, but did not actually take the contract in question. Def.'s Mot. at 5, Apr. 30, 2008. In Omnia, the plaintiff possessed a contractual right to purchase a large quantity of steel from the seller at a low fixed price. However, before the seller could deliver any steel to the plaintiff, the Government requisitioned the seller's entire production of steel plate for the year 1918, because of need for the war effort, and directed the seller not to fulfill its contract with the plaintiff. Omnia, 261 U.S. at 507. The Supreme Court affirmed the decision of the Court of Claims rejecting the plaintiff's claim that the Government's action of requisitioning the seller's steel had effected a taking

for public use of its property in the contract. Id. at 508, 514. While acknowledging the plaintiff's property interest in its contract, within the meaning of the Fifth Amendment, the Supreme Court nonetheless held that the plaintiff's loss was merely "consequential" and one for which takings law afforded no remedy. Id. at 510-11. Although the plaintiff had suffered an undeniable loss, the Supreme Court declared that "destruction of, or injury to, property is frequently accomplished without a 'taking' in the constitutional sense." Id. at 508. The Supreme Court added that there are many laws and governmental regulations that injuriously affect the value of private property but for which no remedy is afforded. Id. at 508 ("If, under any power a contract or other property is *taken* for public use, the government is liable; but, if injured or destroyed by lawful action, without a taking, the government is not liable.") In rejecting Omnia's takings claim, the Court noted that "[f]rustration and appropriation are essentially different things." Id. at 513.

This principle has remain unchanged, and has been affirmed in a wide variety of takings claims where the Government, acting in either a regulatory or commercial capacity, has caused the loss of the benefits of a contract or frustrated business expectations. In each of these cases, the plaintiff failed to receive its expected compensation from private agreements as a results of the Government's actions. See Air Pegasus, 424 F.3d 1209-10; NL Indus. v. United States, 839 F.2d 1578, 1579 (Fed. Cir. 1988); Kearney & Trecker, 688 F.2d 780 (Ct. Cl. 1982).

In Air Pegasus, the Federal Circuit characterized the Omnia court's view on takings as finding a

"significant difference between an *injury* to one's property interest and a *taking* of one's property interest." 424 F.3d at 1216. Similarly, in NL Indus., the Federal Circuit rejected the takings claim of a spent nuclear fuel processor whose significant investment in developing spent nuclear fuel rod transport vehicles for a reprocessing facility was rendered valueless after the Government banned the operation of the facility. 839 F.2d at 1579. The Federal Circuit agreed with the trial court that Omnia by itself was authority enough to support its holding that frustration of a business by loss of a customer was not a taking. Id. at 1579.

Again, in Kearney & Trecker, the Court of Claims relied on Omnia to find that the Government did not appropriate the plaintiff seller's contract with the third party buyer for a made-to-order aerodefense machine by issuing a directive that required the plaintiff to expedite delivery for the Air Force's order of the same machine. 688 F.2d at 783. The court rejected the plaintiff's argument that"[w]hat was appropriated was not just the [machine], but (the plaintiff's) investment backed expectation to produce and deliver a [machine] to [the buyer] at a date certain." Id. at 782. The court held that the frustration of the plaintiff's "expectations" was not compensable, because the Government had not appropriated any of the rights the plaintiff had under its contract, but only made it impossible for the plaintiff to perform it. Id. at 782-83. "Omnia makes it clear that the mere frustration of a contract resulting from the government's exercise of its power of eminent domain is not a 'taking' for which just compensation must be awarded." Id. at 783.

More recently, in Palmyra Pac. Seafoods, L.L.C. v. United States, the Court of Federal Claims held that government regulations designating an area as a National Wildlife Refuge and prohibiting commercial fishing within did not constitute a taking of the plaintiffs' commercial fishing licenses. 80 Fed. Cl. 228, 233 (2008). At most, the plaintiffs' claim amounted to a frustration of purpose, which the court found not to be compensable under the principles laid out in Omnia. Id.

As Acceptance and Rain and Hail only had a letter of intent to enter into an agreement and not an actual contract, Plaintiff's takings claim is less compelling than those of the plaintiffs in Omnia, Air Pegasus, and Kearney & Trecker, all of whose existing contracts were directly impacted by the government's actions. Under the same reasoning as those cases, however, Plaintiff's claim must also be rejected because RMA's alleged action in rejecting or failing to approve the sale, did not effectuate an immediate taking of the crop insurance assets in question. Rather, at most, the government's actions frustrated Plaintiff's business expectations, which does not amount to a compensable taking under the Omnia line of cases. Omnia, 261 U.S. at 513; Kearney & Trecker, 688 F.2d at 783; Palmyra, 80 Fed. Cl. at 233.

Plaintiff makes several unsuccessful attempts to distinguish Omnia and its progeny. First, Plaintiff argues that the Omnia cases are distinguishable on the basis that the plaintiffs in those cases possessed a mere contract expectancy rather than a present property interest. Pl.'s Resp. at 8, June 20, 2008. However, the Supreme Court in Omnia made no distinction between a mere contractual expectancy and

a present property interest and, in fact, found that the plaintiff did have a property interest. 261 U.S. at 508 ("The contract in question was property within the meaning of the Fifth Amendment."). Further, as Defendant notes in its reply brief, Acceptance is in a weaker position than the plaintiffs in the Omnia line of cases. See Def.'s Reply at 2, July 7, 2008. Specifically, the plaintiffs in the Omnia line of cases had binding contracts or leases interfered with by governmental regulation or action while Acceptance only had a non-binding letter of intent with Rain and Hail. Id. Even in the few cases Plaintiff relies on for support, including Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313 (2001), and Cienaga Gardens, 331 F.3d 1319, the plaintiffs had contractually-conferred rights sufficient to meet the Fifth Amendment property interest requirement and, as a result, the plaintiffs in both cases succeeded in their takings claims. Cienaga Gardens, 331 F.3d at 1335 (holding that the legislation was "aimed at the contract rights themselves in order to nullify them"); Tulare Lake, 49 Fed. Cl. at 324 (holding that water use restrictions imposed by the Government effected a taking of property of water users who had contract rights entitling them to the use of a specified quantity of water). Moreover, Plaintiff has not shown that the Government appropriated the benefits of Acceptance's crop insurance assets for itself, in contrast to Cienega Gardens and Tulare Lake, where the courts upheld the plaintiffs' takings claims. Cienaga Gardens, 331 F.3d at 1335 ("Where Congress' actions have the effect of 'keep[ing] [the contract] alive for the use of the government' rather than 'bring[ing] the contract to an end,' a court should conclude that there *has* been a taking.") (comparing Omnia, 261 U.S. at 213); Tulare Lake, 49 Fed. Cl. at 317-18 ("[T]he contract holder can

recover only if the government has actually appropriated the contract itself, *i.e.*, stepped into the shoes of the contracting party and assumed the rights and responsibilities under the contract.").

Second, Plaintiff asserts that Omnia precludes takings claims where the injury to contractual expectations is only consequential or derivative of an action taken against third parties or of general applicability. Pl.'s Resp. at 11, June 20, 2008. Therefore, Plaintiff contends, if the action is specifically directed at a plaintiff, rather than at a third party, then Omnia does not preclude the plaintiff from alleging a cognizable takings claim even if that claim is premised solely on a contractual expectancy. Id. As such, Plaintiff argues that even if Acceptance's takings claim was not premised on its present property interests in its crop insurance business, it still has a potential takings claim based on the RMA's action directed specifically against Acceptance by preventing the sale to Rain and Hail. Id. The Court is not persuaded by Plaintiff's attempts to distinguish Omnia and the related cases where the plaintiffs suffered a loss of business as a result of the government's regulation of a third party. As Defendant notes in its Reply, the Federal Circuit recently rejected a similar attempt to distinguish Omnia in Huntleigh, 525 F.3d at 1381. Def.'s Reply at 7-8, July 7, 2008. In Huntleigh, the Federal Circuit held that, because the plaintiff in Omnia had an existing contractual relationship at which the Government squarely directed its actions, the facts in Omnia were more favorable to the plaintiff than the facts in that case. Huntleigh, 525 F.3d at 1381. The Federal Circuit added that, in Omnia, although the Government requisitioned the steel plate that was meant for Omnia and directed the seller not

to comply with its contract, there was no taking because this lawful government action did not appropriate the contract but only rendered performance of the contract impossible. Id. (citing 261 U.S. at 507, 511). In this case, no contract existed between Acceptance and Rain and Hail at the time of the RMA's actions. Moreover, the Government's actions at most resulted in the frustration of Acceptance's business interest in trying to revive its failing business, but did not appropriate any of Acceptance's crop insurance assets, and thus, did not constitute a taking of Plaintiff's property.

C. RMA's Authority to Approve or Reject Transactions.

Defendant also argues that the RMA has no authority to approve or reject the sale of assets from one insurer to another. Def.'s Mot. Dismiss at 8, Apr. 30, 2008. Thus, Defendant states the Court need not resolve the factual dispute regarding whether RMA rejected the Rain and Hail transaction because to the extent that it did, the RMA acted outside its authority and such action cannot amount to a taking. Id. at 9-10. Given that Plaintiff's property interest cannot be said to be a property right protected under the Fifth Amendment takings clause, the Court need not consider this position.

Conclusion

Based upon the foregoing, Defendant's motion to dismiss under RCFC 12(b)(6) is GRANTED. The Clerk is directed to dismiss Plaintiff's complaint with prejudice.

IT IS SO ORDERED.

s/Thomas C. Wheeler
THOMAS C. WHEELER
Judge

APPENDIX C

United States Code
Title 7. Agriculture
Chapter 36. Crop Insurance
Subchapter I. Federal Crop Insurance Act

7 U.S.C. § 1501. Short title and application of other provisions

This subchapter may be cited as the "Federal Crop Insurance Act". Except as otherwise expressly provided the provisions in Titles I to IV, inclusive, shall not apply with respect to this subchapter, and the term "Act" wherever it appears in such titles shall not be construed to include this subchapter.

7 U.S.C. § 1502. Purpose; definitions; protection of information; relation to other laws

(a) Purpose

It is the purpose of this subchapter to promote the national welfare by improving the economic stability of agriculture through a sound system of crop insurance and providing the means for the research and experience helpful in devising and establishing such insurance.

(b) Definitions

As used in this subchapter:

(1) Additional coverage

The term "additional coverage" means a plan of crop insurance coverage providing a level of coverage greater than the level available under catastrophic risk protection.

(2) Approved insurance provider
The term "approved insurance provider" means a private insurance provider that has been approved by the Corporation to provide insurance coverage to producers participating in the Federal crop insurance program established under this subchapter.
(3) Board
The term "Board" means the Board of Directors of the Corporation established under section 1505(a) of this title.
(4) Corporation
The term "Corporation" means the Federal Crop Insurance Corporation established under section 1503 of this title.
(5) Department
The term "Department" means the United States Department of Agriculture.
(6) Loss ratio
The term "loss ratio" means the ratio of all sums paid by the Corporation as indemnities under any eligible crop insurance policy to that portion of the premium designated for anticipated losses and a reasonable reserve, other than that portion of the premium designated for operating and administrative expenses.
(7) Organic crop
The term "organic crop" means an agricultural commodity that is organically produced consistent with section 6502 of this title.
(8) Secretary
The term "Secretary" means the Secretary of Agriculture.
(9) Transitional yield
The term "transitional yield" means the maximum average production per acre or equivalent measure

that is assigned to acreage for a crop year by the Corporation in accordance with the regulations of the Corporation whenever the producer fails–

(A) to certify that acceptable documentation of production and acreage for the crop year is in the possession of the producer; or

(B) to present the acceptable documentation on the demand of the Corporation or an insurance company reinsured by the Corporation.

(c) Protection of confidential information

(1) General prohibition against disclosure

Except as provided in paragraph (2), the Secretary, any other officer or employee of the Department or an agency thereof, an approved insurance provider and its employees and contractors, and any other person may not disclose to the public information furnished by a producer under this subchapter.

(2) Authorized disclosure

(A) Disclosure in statistical or aggregate form

Information described in paragraph (1) may be disclosed to the public if the information has been transformed into a statistical or aggregate form that does not allow the identification of the person who supplied particular information.

(B) Consent of producer

A producer may consent to the disclosure of information described in paragraph (1). The participation of the producer in, and the receipt of any benefit by the producer under, this subchapter or any other program administered by the Secretary may not be conditioned on the producer providing consent under this paragraph.

(3) Violations; penalties

Section 2276(c) of this title shall apply with respect to the release of information collected in any

manner or for any purpose prohibited by this subsection.

(d) Relation to other laws

(1) Terms and conditions of policies and plans

The terms and conditions of any policy or plan of insurance offered under this subchapter that is reinsured by the Corporation shall not--

(A) be subject to the jurisdiction of the Commodity Futures Trading Commission or the Securities and Exchange Commission; or

(B) be considered to be accounts, agreements (including any transaction that is of the character of, or is commonly known to the trade as, an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty"), or transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market for the purposes of the Commodity Exchange Act (7 U.S.C. 1 et seq.).

(2) Effect on CFTC and Commodity Exchange Act

Nothing in this subchapter affects the jurisdiction of the Commodity Futures Trading Commission or the applicability of the Commodity Exchange Act (7 U.S.C. 1 et seq.) to any transaction conducted on a contract market under that Act by an approved insurance provider to offset the approved insurance provider's risk under a plan or policy of insurance under this subchapter.

7 U.S.C. § 1503. Federal Crop Insurance Corporation; creation; offices

To carry out the purposes of this subchapter, there is hereby created as an agency of and within the Department a body corporate with the name "Federal

Crop Insurance Corporation". The principal office of the Corporation shall be located in the District of Columbia, but there may be established agencies or branch offices elsewhere in the United States under rules and regulations prescribed by the Board.

7 U.S.C. § 1504. Capital stock of Corporation

(a) Subscription by United States

The Corporation shall have a capital stock of $500,000,000 subscribed by the United States of America, payment for which shall, with the approval of the Secretary, be subject to call in whole or in part by the Board.

(b) Appropriations

There is authorized to be appropriated such sums as are necessary for the purpose of subscribing to the capital stock of the Corporation.

(c) Issuance of stock to Secretary of the Treasury

Receipts for payments by the United States of America for or on account of such stock shall be issued by the Corporation to the Secretary of the Treasury and shall be evidence of the stock ownership by the United States of America.

(d) Cancellation of receipts; nonliability of Corporation

Within thirty days after September 26, 1980, the Secretary of the Treasury shall cancel, without consideration, receipts for payments for or on account of the stock of the Corporation outstanding on September 26, 1980, and such receipts shall cease to be liabilities of the Corporation.

7 U.S.C. § 1504a. Capitalization of Corporation

The payment for capital stock in the Federal Crop Insurance Corporation shall be effected by transfer of funds on the books of the Treasury Department to the credit of the Corporation.

7 U.S.C. § 1505. Management of Corporation

(a) Board of Directors

(1) Establishment

The management of the Corporation shall be vested in a Board of Directors subject to the general supervision of the Secretary.

(2) Composition

The Board shall consist of only the following members:

(A) The manager of the Corporation, who shall serve as a nonvoting ex officio member.

(B) The Under Secretary of Agriculture responsible for the Federal crop insurance program.

(C) One additional Under Secretary of Agriculture (as designated by the Secretary).

(D) The Chief Economist of the Department of Agriculture.

(E) One person experienced in the crop insurance business.

(F) One person experienced in reinsurance or the regulation of insurance.

(G) Four active producers who are policy holders, are from different geographic areas of the United States, and represent a cross-section of agricultural commodities grown in the United States, including at least one specialty crop producer.

(3) Appointment of private sector members

The members of the Board described in subparagraphs (E), (F), and (G) of paragraph (2)--

(A) shall be appointed by, and hold office at the pleasure of, the Secretary;

(B) shall not be otherwise employed by the Federal Government;

(C) shall be appointed to staggered 4-year terms, as determined by the Secretary; and

(D) shall serve not more than two consecutive terms.

(4) Chairperson

The Board shall select a member of the Board to serve as Chairperson.

(b) Vacancies

Vacancies in the Board so long as there shall be four members in office shall not impair the powers of the Board to execute the functions of the Corporation, and four of the members in office shall constitute a quorum for the transaction of the business of the Board.

(c) Compensation

The Directors of the Corporation who are employed in the Department shall receive no additional compensation for their services as such Directors but may be allowed necessary traveling and subsistence expenses when engaged in business of the Corporation, outside of the District of Columbia. The Directors of the Corporation who are not employed by the Federal Government shall be paid such compensation for their services as Directors as the Secretary shall determine, but such compensation shall not exceed the daily equivalent of the rate prescribed for grade GS-18 under section 5332 of Title 5 when actually employed, and actual necessary traveling and subsistence expenses, or a per diem allowance in lieu of subsistence expenses, as authorized by section 5703 of Title 5 for persons in Government service employed intermittently, when on the business of the Corporation away from their homes or regular places of business.

(d) Manager of Corporation

The manager of the Corporation shall be its chief executive officer, with such power and authority as

may be conferred by the Board. The manager shall be appointed by, and hold office at the pleasure of, the Secretary.

(e) Expert review of policies, plans of insurance, and related material

(1) Review by experts

The Board shall establish procedures under which any policy or plan of insurance, as well as any related material or modification of such a policy or plan of insurance, to be offered under this subchapter shall be subject to independent reviews by persons experienced as actuaries and in underwriting, as determined by the Board.

(2) Review of Corporation policies and plans

Except as provided in paragraph (3), the Board shall contract with at least five persons to each conduct a review of the policy or plan of insurance, of whom--

(A) not more than one person may be employed by the Federal Government; and

(B) at least one person must be designated by approved insurance providers pursuant to procedures determined by the Board.

(3) Review of private submissions

If the reviews under paragraph (1) cover a policy or plan of insurance, or any related material or modification of a policy or plan of insurance, submitted under section 1508(h) of this title--

(A) the Board shall contract with at least five persons to each conduct a review of the policy or plan of insurance, of whom--

(i) not more than one person may be employed by the Federal Government; and

(ii) none may be employed by an approved insurance provider; and

(B) each review must be completed and submitted to the Board not later than 30 days prior to the end of the 120-day period described in section 1508(h)(4)(D) of this title.

(4) Consideration of reviews

The Board shall include reviews conducted under this subsection as part of the consideration of any policy or plan or insurance, or any related material or modification of a policy or plan of insurance, proposed to be offered under this subchapter.

(5) Funding of reviews

Each contract to conduct a review under this subsection shall be funded from amounts made available under section 1516(b)(2)(A)(ii) of this title.

(6) Relation to other authority

The contract authority provided in this subsection is in addition to any other contracting authority that may be exercised by the Board under section 1506(l) of this title.

7 U.S.C. § 1506. General powers

(a) Succession

The Corporation shall have succession in its corporate name.

(b) Corporate seal

The Corporation may adopt, alter, and use a corporate seal, which shall be judicially noticed.

(c) Property

The Corporation may purchase or lease and hold such real and personal property as it deems necessary or convenient in the transaction of its business, and may dispose of such property held by it upon such terms as it deems appropriate.

(d) Suit

Subject to section 1508(j)(2)(A) of this title, the Corporation, subject to the provisions of section 1508(j) of this title, [FN[1]] may sue and be sued in its corporate name, but no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the Corporation or its property. The district courts of the United States, including the district courts of the District of Columbia and of any territory or possession, shall have exclusive original jurisdiction, without regard to the amount in controversy, of all suits brought by or against the Corporation. The Corporation may intervene in any court in any suit, action, or proceeding in which it has an interest. Any suit against the Corporation shall be brought in the District of Columbia, or in the district wherein the plaintiff resides or is engaged in business.

(e) Bylaws and regulations

The Corporation may adopt, amend, and repeal bylaws, rules, and regulations governing the manner in which its business may be conducted and the powers granted to it by law may be exercised and enjoyed.

(f) Mails

The Corporation shall be entitled to the use of the United States mails in the same manner as the other executive agencies of the Government.

(g) Assistance

The Corporation, with the consent of any board, commission, independent establishment, or executive department of the Government, including any field service thereof, may avail itself of the use of information, services, facilities, officials, and employees thereof in carrying out the provisions of this subchapter.

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[1] So in original.

(h) Collection and sharing of information

(1) Surveys and investigations

The Corporation may conduct surveys and investigations relating to crop insurance, agriculture-related risks and losses, and other issues related to carrying out this subchapter.

(2) Data collection

The Corporation shall assemble data for the purpose of establishing sound actuarial bases for insurance on agricultural commodities.

(3) Sharing of records

Notwithstanding section 1502(c) of this title, records submitted in accordance with this subchapter and section 7333 of this title shall be available to agencies and local offices of the Department, appropriate State and Federal agencies and divisions, and approved insurance providers for use in carrying out this subchapter, such section 7333 of this title, and other agricultural programs.

(i) Expenditures

The Corporation shall determine the character and necessity for its expenditures under this subchapter and the manner in which they shall be incurred, allowed, and paid, without regard to the provisions of any other laws governing the expenditure of public funds and such determinations shall be final and conclusive upon all other officers of the Government.

(j) Settling claims

The Corporation shall have the authority to make final and conclusive settlement and adjustment of any claim by or against the Corporation or a fiscal officer of the Corporation.

(k) Other powers

The Corporation shall have such powers as may be necessary or appropriate for the exercise of the powers

herein specifically conferred upon the Corporation and all such incidental powers as are customary in corporations generally.

(l) Contracts

The Corporation may enter into and carry out contracts or agreements, and issue regulations, necessary in the conduct of its business, as determined by the Board. State and local laws or rules shall not apply to contracts, agreements, or regulations of the Corporation or the parties thereto to the extent that such contracts, agreements, or regulations provide that such laws or rules shall not apply, or to the extent that such laws or rules are inconsistent with such contracts, agreements, or regulations.

(m) Submission of certain information

(1) Social security account and employer identification numbers

The Corporation shall require, as a condition of eligibility for participation in the multiple peril crop insurance program, submission of social security account numbers, subject to the requirements of section 405(c)(2)(C)(iii) of Title 42, and employer identification numbers, subject to the requirements of section 6109(f) of Title 26.

(2) Notification by policyholders

Each policyholder shall notify each individual or other entity that acquires or holds a substantial beneficial interest in such policyholder of the requirements and limitations under this subchapter.

(3) Identification of holders of substantial interests

The Manager of the Corporation may require each policyholder to provide to the Manager, at such times and in such manner as prescribed by the Manager, the name of each individual that holds or

acquires a substantial beneficial interest in the policyholder.

(4) "Substantial beneficial interest" defined

For purposes of this subsection, the term "substantial beneficial interest" means not less than 5 percent of all beneficial interests in the policyholder.

(n) Actuarial soundness

(1) Projected loss ratio as of October 1, 1995

The Corporation shall take such actions as are necessary to improve the actuarial soundness of Federal multiperil crop insurance coverage made available under this subchapter to achieve, on and after October 1, 1995, an overall projected loss ratio of not greater than 1.1, including--

(A) instituting appropriate requirements for documentation of the actual production history of insured producers to establish recorded or appraised yields for Federal crop insurance coverage that more accurately reflect the associated actuarial risk, except that the Corporation may not carry out this paragraph in a manner that would prevent beginning farmers (as defined by the Secretary) from obtaining Federal crop insurance;

(B) establishing in counties, to the extent practicable, a crop insurance option based on area yields in a manner that allows an insured producer to qualify for an indemnity if a loss has occurred in a specified area in which the farm of the insured producer is located;

(C) establishing a database that contains the social security account and employee identification numbers of participating producers, agents, and loss adjusters and using the numbers to identify insured producers,

agents, and loss adjusters who are high risk for actuarial purposes and insured producers who have not documented at least 4 years of production history, to assess the performance of insurance providers, and for other purposes permitted by law; and

(D) taking any other measures authorized by law to improve the actuarial soundness of the Federal crop insurance program while maintaining fairness and effective coverage for agricultural producers.

(2) Projected loss ratio

The Corporation shall take such actions, including the establishment of adequate premiums, as are necessary to improve the actuarial soundness of Federal multiperil crop insurance made available under this subchapter to achieve an overall projected loss ratio of not greater than 1.0.

(3) Nonstandard classification system

To the extent that the Corporation uses the nonstandard classification system, the Corporation shall apply the system to all insured producers in a fair and consistent manner.

(o) Regulations

The Secretary and the Corporation are each authorized to issue such regulations as are necessary to carry out this subchapter.

(p) Purchase of American-made equipment and products

(1) Sense of Congress

It is the sense of Congress that, to the greatest extent practicable, all equipment and products purchased by the Corporation using funds made available to the Corporation should be American-made.

(2) Notice requirement

In providing financial assistance to, or entering into any contract with, any entity for the purchase of equipment and products to carry out this subchapter, the Corporation, to the greatest extent practicable, shall provide to the entity a notice describing the statement made in paragraph (1).

(q) Redesignated (p)

(r) Procedures for responding to certain inquiries

(1) Procedures required

The Corporation shall establish procedures under which the Corporation will provide a final agency determination in response to an inquiry regarding the interpretation by the Corporation of this subchapter or any regulation issued under this subchapter.

(2) Implementation

Not later than 180 days after June 23, 1998, the Corporation shall issue regulations to implement this subsection. At a minimum, the regulations shall establish–

(A) the manner in which inquiries described in paragraph (1) are required to be submitted to the Corporation; and

(B) a reasonable maximum number of days within which the Corporation will respond to all inquiries.

(3) Effect of failure to timely respond

If the Corporation fails to respond to an inquiry in accordance with the procedures established pursuant to this subsection, the person requesting the interpretation of this subchapter or regulation may assume the interpretation is correct for the applicable reinsurance year.

7 U.S.C. §§ 1506a, 1506b. Omitted

7 U.S.C. § 1507. Personnel of Corporation

(a) Appointment; civil service exemption; compensation

The Secretary shall appoint such officers and employees as may be necessary for the transaction of the business of the Corporation pursuant to civil-service laws and regulations, fix their compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of Title 5, define their authority and duties, and delegate to them such of the powers vested in the Corporation as the Secretary may determine appropriate. However, personnel paid by the hour, day, or month when actually employed may be appointed without regard to civil-service laws and regulations.

(b) Application of employees' compensation law

Insofar as applicable, the benefits of subchapter I of chapter 81 of Title 5, shall extend to persons given employment under the provisions of this subchapter, including the employees of the committees and associations referred to in subsection (c) of this section and the members of such committees.

(c) Use of associations of producers and private insurance companies; payment of administrative and program expenses; sale of crop insurance through private agents and brokers: renewals, exclusion of compensation from premium rates, indemnification for errors or omissions of Commission or its contractors

In the administration of this subchapter, the Board shall, to the maximum extent possible, (1) establish or use committees or associations of producers and make payments to them to cover the administrative and program expenses, as determined by the Board, incurred by them in cooperating in carrying out this subchapter, (2) contract with private insurance companies, private rating bureaus, and other organizations as appropriate for actuarial services,

services relating to loss adjustment and rating plans of insurance, and other services to avoid duplication by the Federal Government of services that are or may readily be available in the private sector and to enable the Corporation to concentrate on regulating the provision of insurance under this subchapter and evaluating new products and materials submitted under section 1508(h) or 1523 of this title, and reimburse such companies for the administrative and program expenses, as determined by the Board, incurred by them, under terms and provisions and rates of compensation consistent with those generally prevailing in the insurance industry, and (3) encourage the sale of Federal crop insurance through licensed private insurance agents and brokers and give the insured the right to renew such insurance for successive terms through such agents and brokers, in which case the agent or broker shall be reasonably compensated from premiums paid by the insured for such sales and renewals recognizing the function of the agent or broker to provide continuing services while the insurance is in effect: *Provided*, That such compensation shall not be included in computations establishing premium rates. The Board shall provide such agents and brokers with indemnification, including costs and reasonable attorney fees, from the Corporation for errors or omissions on the part of the Corporation or its contractors for which the agent or broker is sued or held liable, except to the extent the agent or broker has caused the error or omission. Nothing in this subsection shall permit the Corporation to contract with other persons to carry out the responsibility of the Corporation to review and approve policies, rates, and other materials submitted under section 1508(h) of this title.

(d) Allotment of funds to Federal and State agencies

The Secretary may allot to bureaus and offices of the Department or transfer to such other agencies of the State and Federal Governments that the Secretary requests to assist in carrying out this subchapter any funds made available pursuant to the provisions of section 1516 of this title.

(e) Utilization of producer cooperative associations

In carrying out the provisions of this subchapter the Board may, in its discretion, utilize producer-owned and producer-controlled cooperative associations.

(f) Use of resources, data, boards, and committees of Federal agencies

The Board should use, to the maximum extent possible, the resources, data, boards, and the committees of (1) the Soil Conservation Service, in assisting the Board in the classification of land as to risk and production capability and in the development of acceptable conservation practices; (2) the Forest Service, in assisting the Board in the development of a timber insurance plan; (3) the Agricultural Stabilization and Conservation Service, in assisting the Board in the determination of individual producer yields and in serving as a local contact point for farmers where the Board deems necessary; and (4) other Federal agencies in any way the Board deems necessary in carrying out this subchapter.

(g) Specialty Crops Coordinator

(1) The Corporation shall establish a management-level position to be known as the Specialty Crops Coordinator.

(2) The Specialty Crops Coordinator shall have primary responsibility for addressing the needs of specialty crop producers, and for providing information and advice, in connection with the activities of the Corporation to improve and expand the insurance program for specialty crops. In carrying out this

paragraph, the Specialty Crops Coordinator shall act as the liaison of the Corporation with representatives of specialty crop producers and assist the Corporation with the knowledge, expertise, and familiarity of the producers with risk management and production issues pertaining to specialty crops.

(3) The Specialty Crops Coordinator shall use information collected from Corporation field office directors in States in which specialty crops have a significant economic effect and from other sources, including the extension service and colleges and universities.

7 U.S.C. § 1508. Crop insurance

(a) Authority to offer insurance

(1) In general

If sufficient actuarial data are available (as determined by the Corporation), the Corporation may insure, or provide reinsurance for insurers of, producers of agricultural commodities grown in the United States under 1 or more plans of insurance determined by the Corporation to be adapted to the agricultural commodity concerned. To qualify for coverage under a plan of insurance, the losses of the insured commodity must be due to drought, flood, or other natural disaster (as determined by the Secretary).

(2) Period

Except in the cases of tobacco, potatoes, and sweet potatoes, insurance shall not extend beyond the period during which the insured commodity is in the field. As used in the preceding sentence, in the case of an aquacultural species, the term "field" means the environment in which the commodity is produced.

(3) Exclusion of losses due to certain actions of producer

(A) Exclusions

Insurance provided under this subsection shall not cover losses due to--

(i) the neglect or malfeasance of the producer;

(ii) the failure of the producer to reseed to the same crop in such areas and under such circumstances as it is customary to reseed; or

(iii) the failure of the producer to follow good farming practices, including scientifically sound sustainable and organic farming practices.

(B) Good farming practices

(i) Informal administrative process

A producer shall have the right to a review of a determination regarding good farming practices made under subparagraph (A)(iii) in accordance with an informal administrative process to be established by the Corporation.

(ii) Administrative review

(I) No adverse decision

The determination shall not be considered an adverse decision for purposes of subtitle H of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. 6991 et seq.).

(II) Reversal or modification

Except as provided in clause (i), the determination may not be reversed or modified as the result of a subsequent administrative review.

(iii) Judicial review

(I) Right to review

A producer shall have the right to judicial review of the determination without exhausting any right to a review under clause (i).

(II) Reversal or modification

The determination may not be reversed or modified as the result of judicial review unless the determination is found to be arbitrary or capricious.

(C) Limitation on revenue coverage for potatoes

No policy or plan of insurance provided under this subchapter (including a policy or plan of insurance approved by the Board under subsection (h) of this section) shall cover losses due to a reduction in revenue for potatoes except as covered under a whole farm policy or plan of insurance, as determined by the Corporation.

(4) Expansion to other areas or single producers

(A) Area expansion

The Corporation may offer plans of insurance or reinsurance for production of agricultural commodities in the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau in the same manner as provided in this section for production of agricultural commodities in the United States.

(B) Producer expansion

In an area in the United States or specified in subparagraph (A) where crop insurance is not available for a particular agricultural commodity, the Corporation may offer to enter

into a written agreement with an individual producer operating in the area for insurance coverage under this subchapter if the producer has actuarially sound data relating to the production by the producer of the commodity or similar commodities and the data is acceptable to the Corporation.

(5) Dissemination of crop insurance information

(A) Available information

The Corporation shall make available to producers through local offices of the Department–

(i) current and complete information on all aspects of Federal crop insurance; and

(ii) a listing of insurance agents and companies offering to sell crop insurance in the area of the producers.

(B) Use of electronic methods

(i) Dissemination by Corporation

The Corporation shall make the information described in subparagraph (A) available electronically to producers and approved insurance providers.

(ii) Submission to Corporation

To the maximum extent practicable, the Corporation shall allow producers and approved insurance providers to use electronic methods to submit information required by the Corporation.

(6) Addition of new and specialty crops

(A) Data collection

Not later than 180 days after October 13, 1994, the Secretary shall issue guidelines for publication in the Federal Register for data collection to assist the Corporation in

formulating crop insurance policies for new and specialty crops.

(B) Addition of new crops

Not later than 1 year after October 13, 1994, and annually thereafter, the Corporation shall report to Congress on the progress and expected timetable for expanding crop insurance coverage under this subchapter to new and specialty crops.

(C) Addition of direct sale perishable crops

Not later than 1 year after October 13, 1994, the Corporation shall report to Congress on the feasibility of offering a crop insurance program designed to meet the needs of specialized producers of vegetables and other perishable crops who market through direct marketing channels.

(D) Addition of nursery crops

Not later than 2 years after April 4, 1996, the Corporation shall conduct a study and limited pilot program on the feasibility of insuring nursery crops.

(7) Adequate coverage for States

(A) Definition of adequately served

In this paragraph, the term "adequately served" means having a participation rate that is at least 50 percent of the national average participation rate.

(B) Review

The Board shall review the policies and plans of insurance that are offered by approved insurance providers under this subchapter to determine if each State is adequately served by the policies and plans of insurance.

(C) Report

(i) In general

Not later than 30 days after completion of the review under subparagraph (B), the Board shall submit to Congress a report on the results of the review.

(ii) Recommendations

The report shall include recommendations to increase participation in States that are not adequately served by the policies and plans of insurance.

(8) Special provisions for cotton and rice

Notwithstanding any other provision of this subchapter, beginning with the 2001 crops of upland cotton, extra long staple cotton, and rice, the Corporation shall offer plans of insurance, including prevented planting coverage and replanting coverage, under this subchapter that cover losses of upland cotton, extra long staple cotton, and rice resulting from failure of irrigation water supplies due to drought and saltwater intrusion.

(9) Premium adjustments

(A) Prohibition

Except as provided in subparagraph (B), no person shall pay, allow, or give, or offer to pay, allow, or give, directly or indirectly, either as an inducement to procure insurance or after insurance has been procured, any rebate, discount, abatement, credit, or reduction of the premium named in an insurance policy or any other valuable consideration or inducement not specified in the policy.

(B) Exceptions

Subparagraph (A) does not apply with respect to--

(i) a payment authorized under subsection (b)(5)(B);

(ii) a performance-based discount authorized under subsection (d)(3); or

(iii) a patronage dividend, or similar payment, that is paid–

(I) by an entity that was approved by the Corporation to make such payments for the 2005, 2006, or 2007 reinsurance year, in accordance with subsection (b)(5)(B) as in effect on the day before the date of enactment of this paragraph; and

(II) in a manner consistent with the payment plan approved in accordance with that subsection for the entity by the Corporation for the applicable reinsurance year.

(10) Commissions

(A) Definition of immediate family

In this paragraph, the term "immediate family" means an individual's father, mother, stepfather, stepmother, brother, sister, stepbrother, stepsister, son, daughter, stepson, stepdaughter, grandparent, grandson, granddaughter, father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law, daughter-in-law, the spouse of the foregoing, and the individual's spouse.

(B) Prohibition

No individual (including a subagent) may receive directly, or indirectly through an entity, any compensation (including any commission, profit sharing, bonus, or any other direct or indirect benefit) for the sale or service of a policy or plan of insurance offered under this subchapter if–

(i) the individual has a substantial beneficial interest, or a member of the individual's

immediate family has a substantial beneficial interest, in the policy or plan of insurance; and

(ii) the total compensation to be paid to the individual with respect to the sale or service of the policies or plans of insurance that meet the condition described in clause (i) exceeds 30 percent or the percentage specified in State law, whichever is less, of the total of all compensation received directly or indirectly by the individual for the sale or service of all policies and plans of insurance offered under this subchapter for the reinsurance year.

(C) Reporting

Not later than 90 days after the annual settlement date of the reinsurance year, any individual that received directly or indirectly any compensation for the service or sale of any policy or plan of insurance offered under this subchapter in the prior reinsurance year shall certify to applicable approved insurance providers that the compensation that the individual received was in compliance with this paragraph.

(D) Sanctions

The procedural requirements and sanctions prescribed in section 1515(h) of this title shall apply to the prosecution of a violation of this paragraph.

(E) Applicability

(i) In general

Sanctions for violations under this paragraph shall only apply to the individuals or entities directly responsible for the certification required under subparagraph

(C) or the failure to comply with the requirements of this paragraph.

(ii) Prohibition

No sanctions shall apply with respect to the policy or plans of insurance upon which compensation is received, including the reinsurance for those policies or plans.

(b) Catastrophic risk protection

(1) In general

The Corporation shall offer a catastrophic risk protection plan to indemnify producers for crop loss due to loss of yield or prevented planting, if provided by the Corporation, when the producer is unable, because of drought, flood, or other natural disaster (as determined by the Secretary), to plant other crops for harvest on the acreage for the crop year.

(2) Amount of coverage

(A) In general

Subject to subparagraph (B)–

(i) in the case of each of the 1995 through 1998 crop years, catastrophic risk protection shall offer a producer coverage for a 50 percent loss in yield, on an individual yield or area yield basis, indemnified at 60 percent of the expected market price, or a comparable coverage (as determined by the Corporation); and

(ii) in the case of each of the 1999 and subsequent crop years, catastrophic risk protection shall offer a producer coverage for a 50 percent loss in yield, on an individual yield or area yield basis, indemnified at 55 percent of the expected market price, or a comparable coverage (as determined by the Corporation).

(B) Reduction in actual payment

The amount paid to a producer on a claim under catastrophic risk protection may reflect a reduction that is proportional to the out-of-pocket expenses that are not incurred by the producer as a result of not planting, growing, or harvesting the crop for which the claim is made, as determined by the Corporation.

(3) Alternative catastrophic coverage

Beginning with the 2001 crop year, the Corporation shall offer producers of an agricultural commodity the option of selecting either of the following:

(A) The catastrophic risk protection coverage available under paragraph (2)(A).

(B) An alternative catastrophic risk protection coverage that--

(i) indemnifies the producer on an area yield and loss basis if such a policy or plan of insurance is offered for the agricultural commodity in the county in which the farm is located;

(ii) provides, on a uniform national basis, a higher combination of yield and price protection than the coverage available under paragraph (2)(A); and

(iii) the Corporation determines is comparable to the coverage available under paragraph (2)(A) for purposes of subsection (e)(2)(A) of this section.

(4) Sale of catastrophic risk coverage

(A) In general

Catastrophic risk coverage may be offered by--

(i) approved insurance providers, if available in an area; and

(ii) at the option of the Secretary that is based on considerations of need, local offices of the Department.

(B) Need

For purposes of considering need under subparagraph (A)(ii), the Secretary may take into account the most efficient and cost-effective use of resources, the availability of personnel, fairness to local producers, the needs and convenience of local producers, and the availability of private insurance carriers.

(C) Delivery of coverage

(i) In general

In full consultation with approved insurance providers, the Secretary may continue to offer catastrophic risk protection in a State (or a portion of a State) through local offices of the Department if the Secretary determines that there is an insufficient number of approved insurance providers operating in the State or portion of the State to adequately provide catastrophic risk protection coverage to producers.

(ii) Coverage by approved insurance providers

To the extent that catastrophic risk protection coverage by approved insurance providers is sufficiently available in a State (or a portion of a State) as determined by the Secretary, only approved insurance providers may provide the coverage in the State or portion of the State.

(iii) Timing of determinations

Not later than 90 days after April 4, 1996, the Secretary shall announce the results of the determinations under clause (i) for

policies for the 1997 crop year. For subsequent crop years, the Secretary shall make the announcement not later than April 30 of the year preceding the year in which the crop will be produced, or at such other times during the year as the Secretary finds practicable in consultation with affected crop insurance providers for those States (or portions of States) in which catastrophic coverage remains available through local offices of the Department.

(iv) Current policies

This clause shall take effect beginning with the 1997 crop year. Subject to clause (ii) all catastrophic risk protection policies written by local offices of the Department shall be transferred to the approved insurance provider for performance of all sales, service, and loss adjustment functions. Any fees in connection with such policies that are not yet collected at the time of the transfer shall be payable to the approved insurance providers assuming the policies. The transfer process for policies for the 1997 crop year with sales closing dates before January 1, 1997, shall begin at the time of the Secretary's announcement under clause (iii) and be completed by the sales closing date for the crop and county. The transfer process for all subsequent policies (including policies for the 1998 and subsequent crop years) shall begin at a date that permits the process to be completed not later than 45 days before the sales closing date.

(5) Administrative fee

(A) Basic fee

Each producer shall pay an administrative fee for catastrophic risk protection in the amount of $300 per crop per county.

(B) Payment of catastrophic risk protection fee on behalf of producers

(i) Payment authorized

If State law permits a licensing fee to be paid by an insurance provider to a cooperative association or trade association and rebated to a producer through the payment of catastrophic risk protection administrative fees, a cooperative association or trade association located in that State may pay, on behalf of a member of the association in that State or a contiguous State who consents to be insured under such an arrangement, all or a portion of the administrative fee required by this paragraph for catastrophic risk protection.

(ii) Selection of provider

Nothing in this subparagraph limits the option of a producer to select the licensed insurance agent or other approved insurance provider from whom the producer will purchase a policy or plan of insurance or to refuse coverage for which a payment is offered to be made under clause (i).

(iii) Delivery of insurance

Catastrophic risk protection coverage for which a payment is made under clause (i) shall be delivered by a licensed insurance agent or other approved insurance provider.

(iv) Additional coverage encouraged

A cooperative association or trade association, and any approved insurance provider with whom a licensing fee is made,

shall encourage producer members to purchase appropriate levels of coverage in order to meet the risk management needs of the member producers.

(v) Redesignated (iv)

(vi) Repealed. Pub.L. 110-234, Title XII, § 12006(a)(2)(C), May 22, 2008, 122 Stat. 1373; Pub.L. 110-246, Title XII, § 12006(a)(2)(C), June 18, 2008, 122 Stat. 2135

(C) Time for payment

The administrative fee required by this paragraph shall be paid by the producer on the same date on which the premium for a policy of additional coverage would be paid by the producer.

(D) Use of fees

(i) In general

The amounts paid under this paragraph shall be deposited in the crop insurance fund established under section 1516(c) of this title, to be available for the programs and activities of the Corporation.

(ii) Limitation

No funds deposited in the crop insurance fund under this subparagraph may be used to compensate an approved insurance provider or agent for the delivery of services under this subsection.

(E) Waiver of fee

The Corporation shall waive the amounts required under this paragraph for limited resource farmers, as defined by the Corporation.

(6) Participation requirement

A producer may obtain catastrophic risk coverage for a crop of the producer on land in the county only

if the producer obtains the coverage for the crop on all insurable land of the producer in the county.

(7) Eligibility for Department programs

(A) In general

Effective for the spring-planted 1996 and subsequent crops (and fall-planted 1996 crops at the option of the Secretary), to be eligible for any payment or loan under the Agricultural Market Transition Act [7 U.S.C.A. § 7201 et seq.], for the conservation reserve program, or for any benefit described in section 2008f of this title, a person shall–

(i) obtain at least the catastrophic level of insurance for each crop of economic significance in which the person has an interest; or

(ii) provide a written waiver to the Secretary that waives any eligibility for emergency crop loss assistance in connection with the crop.

(B) "Crop of economic significance" defined

As used in this paragraph, the term "crop of economic significance" means a crop that has contributed, or is expected to contribute, 10 percent or more of the total expected value of all crops grown by the producer.

(8) Limitation due to risk

The Corporation may limit catastrophic risk coverage in any county or area, or on any farm, on the basis of the insurance risk concerned.

(9) Transitional coverage for 1995 crops

Effective only for a 1995 crop planted or for which insurance attached prior to January 1, 1995, the Corporation shall allow producers of the crops until not later than the end of the 180-day period beginning on the date of enactment of the Federal

Crop Insurance Reform Act of 1994 [Oct. 13, 1994] to obtain catastrophic risk protection for the crop. On enactment of such Act, a producer who made timely purchases of a crop insurance policy before the date of enactment of such Act, under the provisions of this subchapter then in effect, shall be eligible for the same benefits to which a producer would be entitled under comparable additional coverage under subsection (c) of this section.

(10) Simplification

(A) Catastrophic risk protection plans

In developing and carrying out the policies and procedures for a catastrophic risk protection plan under this subchapter, the Corporation shall, to the maximum extent practicable, minimize the paperwork required and the complexity and costs of procedures governing applications for, processing, and servicing of the plan for all parties involved.

(B) Other plans

To the extent that the policies and procedures developed under subparagraph (A) may be applied to other plans of insurance offered under this subchapter without jeopardizing the actuarial soundness or integrity of the crop insurance program, the Corporation shall apply the policies and procedures to the other plans of insurance within a reasonable period of time (as determined by the Corporation) after the effective date of this paragraph.

(11) Loss adjustment

The rate for reimbursing an approved insurance provider or agent for expenses incurred by the approved insurance provider or agent for loss adjustment in connection with a policy of catastrophic risk protection shall not exceed 6

percent of the premium for catastrophic risk protection that is used to define loss ratio.

(c) General coverage levels

(1) Additional coverage generally

(A) In general

The Corporation shall offer to producers of agricultural commodities grown in the United States plans of crop insurance that provide additional coverage.

(B) Purchase

To be eligible for additional coverage, a producer must apply to an approved insurance provider for purchase of additional coverage if the coverage is available from an approved insurance provider. If additional coverage is unavailable privately, the Corporation may offer additional coverage plans of insurance directly to producers.

(2) Transfer of relevant information

If a producer has already applied for catastrophic risk protection at the local office of the Department and elects to purchase additional coverage, the relevant information for the crop of the producer shall be transferred to the approved insurance provider servicing the additional coverage crop policy.

(3) Yield and loss basis

A producer shall have the option of purchasing additional coverage based on an individual yield and loss basis or on an area yield and loss basis, if both options are offered by the Corporation.

(4) Level of coverage

The level of coverage shall be dollar denominated and may be purchased at any level not to exceed 85 percent of the individual yield or 95 percent of the area yield (as determined by the Corporation). Not

later than the beginning of the 1996 crop year, the Corporation shall provide producers with information on catastrophic risk and additional coverage in terms of dollar coverage (within the allowable limits of coverage provided in this paragraph).

(5) Expected market price

(A) Establishment or approval

For the purposes of this subchapter, the Corporation shall establish or approve the price level (referred to in this subchapter as the "expected market price") of each agricultural commodity for which insurance is offered.

(B) General rule

Except as otherwise provided in subparagraph (C), the expected market price of an agricultural commodity shall be not less than the projected market price of the agricultural commodity, as determined by the Corporation.

(C) Other authorized approaches

The expected market price of an agricultural commodity--

(i) may be based on the actual market price of the agricultural commodity at the time of harvest, as determined by the Corporation;

(ii) in the case of revenue and other similar plans of insurance, may be the actual market price of the agricultural commodity, as determined by the Corporation;

(iii) in the case of cost of production or similar plans of insurance, shall be the projected cost of producing the agricultural commodity, as determined by the Corporation; or

(iv) in the case of other plans of insurance, may be an appropriate amount, as determined by the Corporation.

(D) Grain sorghum price election

(i) In general

The Corporation, in conjunction with the Secretary (referred to in this subparagraph as the "Corporation"), shall--

(I) not later than 60 days after the date of enactment of this subparagraph, make available all methods and data, including data from the Economic Research Service, used by the Corporation to develop the expected market prices for grain sorghum under the production and revenue-based plans of insurance of the Corporation; and

(II) request applicable data from the grain sorghum industry.

(ii) Expert reviewers

(I) In general

Not later than 120 days after the date of enactment of this subparagraph, the Corporation shall contract individually with 5 expert reviewers described in subclause (II) to develop and recommend a methodology for determining an expected market price for sorghum for both the production and revenue-based plans of insurance to more accurately reflect the actual price at harvest.

(II) Requirements

The expert reviewers under subclause (I) shall be comprised of agricultural economists with experience in grain sorghum and corn markets, of whom--

(aa) 2 shall be agricultural economists of institutions of higher education;

(bb) 2 shall be economists from within the Department; and

(cc) 1 shall be an economist nominated by the grain sorghum industry.

(iii) Recommendations

(I) In general

Not later than 90 days after the date of contracting with the expert reviewers under clause (ii), the expert reviewers shall submit, and the Corporation shall make available to the public, the recommendations of the expert reviewers.

(II) Consideration

The Corporation shall consider the recommendations under subclause (I) when determining the appropriate pricing methodology to determine the expected market price for grain sorghum under both the production and revenue-based plans of insurance.

(III) Publication

Not later than 60 days after the date on which the Corporation receives the recommendations of the expert reviewers, the Corporation shall publish the proposed pricing methodology for both the production and revenue-based plans of insurance for notice and comment and, during the comment period, conduct at least 1 public meeting

to discuss the proposed pricing methodologies.

(iv) Appropriate pricing methodology

(I) In general

Not later than 180 days after the close of the comment period in clause (iii)(III), but effective not later than the 2010 crop year, the Corporation shall implement a pricing methodology for grain sorghum under the production and revenue-based plans of insurance that is transparent and replicable.

(II) Interim methodology

Until the date on which the new pricing methodology is implemented, the Corporation may continue to use the pricing methodology that the Corporation determines best establishes the expected market price.

(III) Availability

On an annual basis, the Corporation shall make available the pricing methodology and data used to determine the expected market prices for grain sorghum under the production and revenue-based plans of insurance, including any changes to the methodology used to determine the expected market prices for grain sorghum from the previous year.

(6) Price elections

(A) In general

Subject to subparagraph (B), insurance coverage shall be made available to a producer on the basis of any price election that equals or is less than the price election established by the

Corporation. The coverage shall be quoted in terms of dollars per acre.

(B) Minimum price elections

The Corporation may establish minimum price elections below which levels of insurance shall not be offered.

(C) Wheat classes and malting barley

The Corporation shall, as the Corporation determines practicable, offer producers different price elections for classes of wheat and malting barley (including contract prices in the case of malting barley), in addition to the standard price election, that reflect different market prices, as determined by the Corporation. The Corporation shall, as the Corporation determines practicable, offer additional coverage for each class determined under this subparagraph and charge a premium for each class that is actuarially sound.

(7) Fire and hail coverage

For levels of additional coverage equal to 65 percent or more of the recorded or appraised average yield indemnified at 100 percent of the expected market price, or an equivalent coverage, a producer may elect to delete from the additional coverage any coverage against damage caused by fire and hail if the producer obtains an equivalent or greater dollar amount of coverage for damage caused by fire and hail from an approved insurance provider. On written notice of the election to the company issuing the policy providing additional coverage and submission of evidence of substitute coverage on the commodity insured, the premium of the producer shall be reduced by an amount determined by the Corporation to be actuarially appropriate, taking into account the actuarial value

of the remaining coverage provided by the Corporation. In no event shall the producer be given credit for an amount of premium determined to be greater than the actuarial value of the protection against losses caused by fire and hail that is included in the additional coverage for the crop.

(8) State premium subsidies

The Corporation may enter into an agreement with any State or agency of a State under which the State or agency may pay to the approved insurance provider an additional premium subsidy to further reduce the portion of the premium paid by producers in the State.

(9) Limitations on additional coverage

The Board may limit the availability of additional coverage under this subsection in any county or area, or on any farm, on the basis of the insurance risk involved. The Board shall not offer additional coverage equal to less than 50 percent of the recorded or appraised average yield indemnified at 100 percent of the expected market price, or an equivalent coverage.

(10) Administrative fee

(A) Fee required

If a producer elects to purchase coverage for a crop at a level in excess of catastrophic risk protection, the producer shall pay an administrative fee for the additional coverage of $30 per crop per county.

(B) Use of fees; waiver

Subparagraphs (D) and (E) of subsection (b)(5) of this section shall apply with respect to the collection and use of administrative fees under this paragraph.

(C) Time for payment

Subsection (b)(5)(C) shall apply with respect to the collection date for the administrative fee.

(d) Premiums

(1) Premiums required

The Corporation shall fix adequate premiums for all the plans of insurance of the Corporation at such rates as the Board determines are actuarially sufficient to attain an expected loss ratio of not greater than--

(A) 1.1 through September 30, 1998;

(B) 1.075 for the period beginning October 1, 1998, and ending on the day before the date of enactment of the Food, Conservation, and Energy Act of 2008; and

(C) 1.0 on and after the date of enactment of that Act.

(2) Premium amounts

The premium amounts for catastrophic risk protection under subsection (b) of this section and additional coverage under subsection (c) of this section shall be fixed as follows:

(A) In the case of catastrophic risk protection, the amount of the premium shall be sufficient to cover anticipated losses and a reasonable reserve.

(B) In the case of additional coverage equal to or greater than 50 percent of the recorded or appraised average yield indemnified at not greater than 100 percent of the expected market price, or a comparable coverage for a policy or plan of insurance that is not based on individual yield, the amount of the premium shall--

(i) be sufficient to cover anticipated losses and a reasonable reserve; and

(ii) include an amount for operating and administrative expenses, as determined by

the Corporation, on an industry-wide basis as a percentage of the amount of the premium used to define loss ratio.

(3) Performance-based discount

The Corporation may provide a performance-based premium discount for a producer of an agricultural commodity who has good insurance or production experience relative to other producers of that agricultural commodity in the same area, as determined by the Corporation.

(4) Billing date for premiums

Effective beginning with the 2012 reinsurance year, the Corporation shall establish August 15 as the billing date for premiums.

(e) Payment of portion of premium by Corporation

(1) In general

For the purpose of encouraging the broadest possible participation of producers in the catastrophic risk protection provided under subsection (b) of this section and the additional coverage provided under subsection (c) of this section, the Corporation shall pay a part of the premium in the amounts provided in accordance with this subsection.

(2) Amount of payment

Subject to paragraphs (4), (6), and (7), the amount of the premium to be paid by the Corporation shall be as follows:

(A) In the case of catastrophic risk protection, the amount shall be equivalent to the premium established for catastrophic risk protection under subsection (d)(2)(A) of this section.

(B) In the case of additional coverage equal to or greater than 50 percent, but less than 55 percent, of the recorded or appraised average yield indemnified at not greater than 100

percent of the expected market price, or a comparable coverage for a policy or plan of insurance that is not based on individual yield, the amount shall be equal to the sum of–

(i) 67 percent of the amount of the premium established under subsection (d)(2)(B)(i) of this section for the coverage level selected; and

(ii) the amount determined under subsection (d)(2)(B)(ii) of this section for the coverage level selected to cover operating and administrative expenses.

(C) In the case of additional coverage equal to or greater than 55 percent, but less than 65 percent, of the recorded or appraised average yield indemnified at not greater than 100 percent of the expected market price, or a comparable coverage for a policy or plan of insurance that is not based on individual yield, the amount shall be equal to the sum of–

(i) 64 percent of the amount of the premium established under subsection (d)(2)(B)(i) of this section for the coverage level selected; and

(ii) the amount determined under subsection (d)(2)(B)(ii) of this section for the coverage level selected to cover operating and administrative expenses.

(D) In the case of additional coverage equal to or greater than 65 percent, but less than 75 percent, of the recorded or appraised average yield indemnified at not greater than 100 percent of the expected market price, or a comparable coverage for a policy or plan of insurance that is not based on individual yield, the amount shall be equal to the sum of–

(i) 59 percent of the amount of the premium established under subsection (d)(2)(B)(i) of this section for the coverage level selected; and

(ii) the amount determined under subsection (d)(2)(B)(ii) of this section for the coverage level selected to cover operating and administrative expenses.

(E) In the case of additional coverage equal to or greater than 75 percent, but less than 80 percent, of the recorded or appraised average yield indemnified at not greater than 100 percent of the expected market price, or a comparable coverage for a policy or plan of insurance that is not based on individual yield, the amount shall be equal to the sum of--

(i) 55 percent of the amount of the premium established under subsection (d)(2)(B)(i) of this section for the coverage level selected; and

(ii) the amount determined under subsection (d)(2)(B)(ii) of this section for the coverage level selected to cover operating and administrative expenses.

(F) In the case of additional coverage equal to or greater than 80 percent, but less than 85 percent, of the recorded or appraised average yield indemnified at not greater than 100 percent of the expected market price, or a comparable coverage for a policy or plan of insurance that is not based on individual yield, the amount shall be equal to the sum of--

(i) 48 percent of the amount of the premium established under subsection (d)(2)(B)(i) of

this section for the coverage level selected; and

(ii) the amount determined under subsection (d)(2)(B)(ii) of this section for the coverage level selected to cover operating and administrative expenses.

(G) Subject to subsection (c)(4) of this section, in the case of additional coverage equal to or greater than 85 percent of the recorded or appraised average yield indemnified at not greater than 100 percent of the expected market price, or a comparable coverage for a policy or plan of insurance that is not based on individual yield, the amount shall be equal to the sum of--

(i) 38 percent of the amount of the premium established under subsection (d)(2)(B)(i) of this section for the coverage level selected; and

(ii) the amount determined under subsection (d)(2)(B)(ii) of this section for the coverage level selected to cover operating and administrative expenses.

(3) Prohibition on continuous coverage

Notwithstanding paragraph (2), during each of the 2001 and subsequent reinsurance years, additional coverage under subsection (c) of this section shall be available only in 5 percent increments beginning at 50 percent of the recorded or appraised average yield.

(4) Premium payment disclosure

Each policy or plan of insurance under this subchapter shall prominently indicate the dollar amount of the portion of the premium paid by the Corporation.

(5) Enterprise and whole farm units

(A) In general

The Corporation may carry out a pilot program under which the Corporation pays a portion of the premiums for plans or policies of insurance for which the insurable unit is defined on a whole farm or enterprise unit basis that is higher than would otherwise be paid in accordance with paragraph (2).

(B) Amount

The percentage of the premium paid by the Corporation to a policyholder for a policy with an enterprise or whole farm unit under this paragraph shall, to the maximum extent practicable, provide the same dollar amount of premium subsidy per acre that would otherwise have been paid by the Corporation under paragraph (2) if the policyholder had purchased a basic or optional unit for the crop for the crop year.

(C) Limitation

The amount of the premium paid by the Corporation under this paragraph may not exceed 80 percent of the total premium for the enterprise or whole farm unit policy.

(6) Premium subsidy for area revenue plans

Subject to paragraph (4), in the case of a policy or plan of insurance that covers losses due to a reduction in revenue in an area, the amount of the premium paid by the Corporation shall be as follows:

(A) In the case of additional area coverage equal to or greater than 70 percent, but less than 75 percent, of the recorded county yield indemnified at not greater than 100 percent of the expected market price, the amount shall be equal to the sum of--

(i) 59 percent of the amount of the premium established under subsection (d)(2)(B)(i) for the coverage level selected; and

(ii) the amount determined under subsection (d)(2)(B)(ii) for the coverage level selected to cover operating and administrative expenses.

(B) In the case of additional area coverage equal to or greater than 75 percent, but less than 85 percent, of the recorded county yield indemnified at not greater than 100 percent of the expected market price, the amount shall be equal to the sum of–

(i) 55 percent of the amount of the premium established under subsection (d)(2)(B)(i) for the coverage level selected; and

(ii) the amount determined under subsection (d)(2)(B)(ii) for the coverage level selected to cover operating and administrative expenses.

(C) In the case of additional area coverage equal to or greater than 85 percent, but less than 90 percent, of the recorded county yield indemnified at not greater than 100 percent of the expected market price, the amount shall be equal to the sum of–

(i) 49 percent of the amount of the premium established under subsection (d)(2)(B)(i) for the coverage level selected; and

(ii) the amount determined under subsection (d)(2)(B)(ii) for the coverage level selected to cover operating and administrative expenses.

(D) In the case of additional area coverage equal to or greater than 90 percent of the recorded county yield indemnified at not greater

than 100 percent of the expected market price, the amount shall be equal to the sum of–

(i) 44 percent of the amount of the premium established under subsection (d)(2)(B)(i) for the coverage level selected; and

(ii) the amount determined under subsection (d)(2)(B)(ii) for the coverage level selected to cover operating and administrative expenses.

(7) Premium subsidy for area yield plans

Subject to paragraph (4), in the case of a policy or plan of insurance that covers losses due to a loss of yield or prevented planting in an area, the amount of the premium paid by the Corporation shall be as follows:

(A) In the case of additional area coverage equal to or greater than 70 percent, but less than 80 percent, of the recorded county yield indemnified at not greater than 100 percent of the expected market price, the amount shall be equal to the sum of–

(i) 59 percent of the amount of the premium established under subsection (d)(2)(B)(i) for the coverage level selected; and

(ii) the amount determined under subsection (d)(2)(B)(ii) for the coverage level selected to cover operating and administrative expenses.

(B) In the case of additional area coverage equal to or greater than 80 percent, but less than 90 percent, of the recorded county yield indemnified at not greater than 100 percent of the expected market price, the amount shall be equal to the sum of–

(i) 55 percent of the amount of the premium established under subsection (d)(2)(B)(i) for the coverage level selected; and

(ii) the amount determined under subsection (d)(2)(B)(ii) for the coverage level selected to cover operating and administrative expenses.

(C) In the case of additional area coverage equal to or greater than 90 percent, [FN[1]] of the recorded county yield indemnified at not greater than 100 percent of the expected market price, the amount shall be equal to the sum of–

(i) 51 percent of the amount of the premium established under subsection (d)(2)(B)(i) for the coverage level selected; and

(ii) the amount determined under subsection (d)(2)(B)(ii) for the coverage level selected to cover operating and administrative expenses.

(f) Eligibility

(1) In general

To participate in catastrophic risk protection coverage under this section, a producer shall submit an application at the local office of the Department or to an approved insurance provider.

(2) Sales closing date

(A) In general

For coverage under this subchapter, each producer shall purchase crop insurance on or before the sales closing date for the crop by providing the required information and executing the required documents. Subject to the goal of ensuring actuarial soundness for the

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[1] So in original. The comma probably should not appear.

crop insurance program, the sales closing date shall be established by the Corporation to maximize convenience to producers in obtaining benefits under price and production adjustment programs of the Department.

(B) Established dates

Except as provided in subparagraph (C), the Corporation shall establish, for an insurance policy for each insurable crop that is planted in the spring, a sales closing date that is 30 days earlier than the corresponding sales closing date that was established for the 1994 crop year.

(C) Exception

If compliance with subparagraph (B) results in a sales closing date for an agricultural commodity that is earlier than January 31, the sales closing date for that commodity shall be January 31 beginning with the 2000 crop year.

(3) Records and reporting

To obtain catastrophic risk protection under subsection (b) of this section or additional coverage under subsection (c) of this section, a producer shall--

(A) provide annually records acceptable to the Secretary regarding crop acreage, acreage yields, and production for each agricultural commodity insured under this subchapter or accept a yield determined by the Corporation; and

(B) report acreage planted and prevented from planting by the designated acreage reporting date for the crop and location as established by the Corporation.

(g) Yield determinations

(1) In general

Subject to paragraph (2), the Corporation shall establish crop insurance underwriting rules that ensure that yield coverage, as specified in this subsection, is provided to eligible producers obtaining catastrophic risk protection under subsection (b) of this section or additional coverage under subsection (c) of this section.

(2) Yield coverage plans

(A) Actual production history

Subject to subparagraph (B), the yield for a crop shall be based on the actual production history for the crop, if the crop was produced on the farm without penalty during each of the 4 crop years immediately preceding the crop year for which actual production history is being established, building up to a production data base for each of the 10 consecutive crop years preceding the crop year for which actual production history is being established.

(B) Assigned yield

If the producer does not provide satisfactory evidence of the yield of a commodity under subparagraph (A), the producer shall be assigned--

(i) a yield that is not less than 65 percent of the transitional yield of the producer (adjusted to reflect actual production reflected in the records acceptable to the Corporation for continuous years), as specified in regulations issued by the Corporation based on production history requirements; or

(ii) a yield determined by the Corporation, in the case of–

(I) a producer that has not had a share of the production of the insured crop for

more than two crop years, as determined by the Secretary;

(II) a producer that produces an agricultural commodity on land that has not been farmed by the producer; or

(III) a producer that rotates a crop produced on a farm to a crop that has not been produced on the farm.

(C) Area yield

The Corporation may offer a crop insurance plan based on an area yield that allows an insured producer to qualify for an indemnity if a loss has occurred in an area (as specified by the Corporation) in which the farm of the producer is located. Under an area yield plan, an insured producer shall be allowed to select the level of area production at which an indemnity will be paid consistent with such terms and conditions as are established by the Corporation.

(D) Commodity-by-commodity basis

A producer may choose between individual yield or area yield coverage or combined coverage, if available, on a commodity-by-commodity basis.

(3) Transitional yields for producers of feed or forage

(A) In general

If a producer does not provide satisfactory evidence of a yield under paragraph (2)(A), the producer shall be assigned a yield that is at least 80 percent of the transitional yield established by the Corporation (adjusted to reflect the actual production history of the producer) if the Secretary determines that–

(i) the producer grows feed or forage primarily for on-farm use in a livestock, dairy, or poultry operation; and

(ii) over 50 percent of the net farm income of the producer is derived from the operation.

(B) Yield calculation

The Corporation shall--

(i) for the first year of participation of a producer, provide the assigned yield under this paragraph to the producer of feed or forage; and

(ii) for the second year of participation of the producer, apply the actual production history or assigned yield requirement, as provided in this subsection.

(C) Termination of authority

The authority provided by this paragraph shall terminate on the date that is 3 years after the effective date of this paragraph.

(4) Adjustment in actual production history to establish insurable yields

(A) Application

This paragraph shall apply whenever the Corporation uses the actual production records of the producer to establish the producer's actual production history for an agricultural commodity for any of the 2001 and subsequent crop years.

(B) Election to use percentage of transitional yield

If, for one or more of the crop years used to establish the producer's actual production history of an agricultural commodity, the producer's recorded or appraised yield of the commodity was less than 60 percent of the applicable transitional yield, as determined by

the Corporation, the Corporation shall, at the election of the producer--

(i) exclude any of such recorded or appraised yield; and

(ii) replace each excluded yield with a yield equal to 60 percent of the applicable transitional yield.

(C) Premium adjustment

In the case of a producer that makes an election under subparagraph (B), the Corporation shall adjust the premium to reflect the risk associated with the adjustment made in the actual production history of the producer.

(5) Adjustment to reflect increased yields from successful pest control efforts

(A) Situations justifying adjustment

The Corporation shall develop a methodology for adjusting the actual production history of a producer when each of the following apply:

(i) The producer's farm is located in an area where systematic, area-wide efforts have been undertaken using certain operations or measures, or the producer's farm is a location at which certain operations or measures have been undertaken, to detect, eradicate, suppress, or control, or at least to prevent or retard the spread of, a plant disease or plant pest, including a plant pest (as defined in section 7759 of this title).

(ii) The presence of the plant disease or plant pest has been found to adversely affect the yield of the agricultural commodity for which the producer is applying for insurance.

(iii) The efforts described in clause (i) have been effective.

(B) Adjustment amount

The amount by which the Corporation adjusts the actual production history of a producer of an agricultural commodity shall reflect the degree to which the success of the systematic, area-wide efforts described in subparagraph (A), on average, increases the yield of the commodity on the producer's farm, as determined by the Corporation.

(h) Submission of policies and materials to Board

(1) In general

In addition to any standard forms or policies that the Board may require be made available to producers under subsection (c) of this section, a person (including an approved insurance provider, a college or university, a cooperative or trade association, or any other person) may prepare for submission or propose to the Board--

(A) other crop insurance policies and provisions of policies; and

(B) rates of premiums for multiple peril crop insurance pertaining to wheat, soybeans, field corn, and any other crops determined by the Secretary.

(2) Submission of policies

A policy or other material submitted to the Board under this subsection may be prepared without regard to the limitations contained in this subchapter, including the requirements concerning the levels of coverage and rates and the requirement that a price level for each commodity insured must equal the expected market price for the commodity as established by the Board.

(3) Review and approval by the Board

A policy or other material submitted to the Board under this subsection shall be reviewed by the

Board and, if the Board finds that the interests of producers are adequately protected and that any premiums charged to the producers are actuarially appropriate, shall be approved by the Board for reinsurance and for sale by approved insurance providers to producers as an additional choice at actuarially appropriate rates and under appropriate terms and conditions. The Corporation may enter into more than 1 reinsurance agreement with the approved insurance provider simultaneously to facilitate the offering of the new policies.

(4) Guidelines for submission and review

The Corporation shall issue regulations to establish guidelines for the submission, and Board review, of policies or other material submitted to the Board under this subsection. At a minimum, the guidelines shall ensure the following:

(A) Confidentiality

(i) In general

A proposal submitted to the Board under this subsection (including any information generated from the proposal) shall be considered to be confidential commercial or financial information for the purposes of section 552(b)(4) of Title 5.

(ii) Standard of confidentiality

If information concerning a proposal could be withheld by the Secretary under the standard for privileged or confidential information pertaining to trade secrets and commercial or financial information under section 552(b)(4) of Title 5, the information shall not be released to the public.

(iii) Application

This subparagraph shall apply with respect to a proposal only during the period preceding any approval of the proposal by the Board.

(B) Personal presentation

The Board shall provide an applicant with the opportunity to present the proposal to the Board in person if the applicant so desires.

(C) Notification of intent to disapprove

(i) Time period

The Board shall provide an applicant with notification of intent to disapprove a proposal not later than 30 days prior to making the disapproval.

(ii) Modification of application

(I) Authority

An applicant that receives the notification may modify the application, and such application, as modified, shall be considered by the Board in the manner provided in subparagraph (D) within the 30-day period beginning on the date the modified application is submitted.

(II) Time period

Clause (i) shall not apply to the Board's consideration of the modified application.

(iii) Explanation

Any notification of intent to disapprove a policy or other material submitted under this subsection shall be accompanied by a complete explanation as to the reasons for the Board's intention to deny approval.

(D) Determination to approve or disapprove policies or materials

(i) Time period

Not later than 120 days after a policy or other material is submitted under this subsection, the Board shall make a determination to approve or disapprove the policy or material.

(ii) Explanation

Any determination by the Board to disapprove any policy or other material shall be accompanied by a complete explanation of the reasons for the Board's decision to deny approval.

(iii) Failure to meet deadline

Notwithstanding any other provision of this subchapter, if the Board fails to make a determination within the prescribed time period, the submitted policy or other material shall be deemed approved by the Board for the initial reinsurance year designated for the policy or material, unless the Board and the applicant agree to an extension.

(5) Premium schedule

(A) Payment by Corporation

In the case of a policy or plan of insurance developed and approved under this subsection or section 1522 of this title, or conducted under section 1523 of this title (other than a policy or plan of insurance applicable to livestock), the Corporation shall pay a portion of the premium of the policy or plan of insurance that is equal to—

(i) the percentage, specified in subsection (e) of this section for a similar level of coverage, of the total amount of the premium used to define loss ratio; and

(ii) an amount for administrative and operating expenses determined in accordance with subsection (k)(4) of this section.

(B) Transitional schedule

Effective only during the 2001 reinsurance year, in the case of a policy or plan of insurance developed and approved under this subsection or section 1522 of this title, or conducted under section 1523 of this title (other than a policy or plan of insurance applicable to livestock), and first approved by the Board after June 20, 2000, the payment by the Corporation of a portion of the premium of the policy may not exceed the dollar amount that would otherwise be authorized under subsection (e) of this section (consistent with subsection (c)(5) of this section, as in effect on the day before June 20, 2000).

(6) Additional prevented planting policy coverage

(A) In general

Beginning with the 1995 crop year, the Corporation shall offer to producers additional prevented planting coverage that insures producers against losses in accordance with this paragraph.

(B) Approved insurance providers

Additional prevented planting coverage shall be offered by the Corporation through approved insurance providers.

(C) Timing of loss

A crop loss shall be covered by the additional prevented planting coverage if–

(i) crop insurance policies were obtained for--

(I) the crop year the loss was experienced; and

(II) the crop year immediately preceding the year of the prevented planting loss; and

(ii) the cause of the loss occurred--

(I) after the sales closing date for the crop in the crop year immediately preceding the loss; and

(II) before the sales closing date for the crop in the year in which the loss is experienced.

(i) Adoption of rates and coverages

(1) In general

The Corporation shall adopt, as soon as practicable, rates and coverages that will improve the actuarial soundness of the insurance operations of the Corporation for those crops that are determined to be insured at rates that are not actuarially sound, except that no rate may be increased by an amount of more than 20 percent over the comparable rate of the preceding crop year.

(2) Review of rating methodologies

To maximize participation in the Federal crop insurance program and to ensure equity for producers, the Corporation shall periodically review the methodologies employed for rating plans of insurance under this subchapter consistent with section 1507(c)(2) of this title.

(3) Analysis of rating and loss history

The Corporation shall analyze the rating and loss history of approved policies and plans of insurance for agricultural commodities by area.

(4) Premium adjustment

If the Corporation makes a determination that premium rates are excessive for an agricultural commodity in an area relative to the requirements of subsection (d)(2) of this section for that area,

then, for the 2002 crop year (and as necessary thereafter), the Corporation shall make appropriate adjustments in the premium rates for that area for that agricultural commodity.

(j) Claims for losses

(1) In general

Under rules prescribed by the Corporation, the Corporation may provide for adjustment and payment of claims for losses. The rules prescribed by the Corporation shall establish standards to ensure that all claims for losses are adjusted, to the extent practicable, in a uniform and timely manner.

(2) Denial of claims

(A) In general

Subject to subparagraph (B), if a claim for indemnity is denied by the Corporation or an approved provider on behalf of the Corporation, an action on the claim may be brought against the Corporation or Secretary only in the United States district court for the district in which the insured farm is located.

(B) Statute of limitations

A suit on the claim may be brought not later than 1 year after the date on which final notice of denial of the claim is provided to the claimant.

(3) Indemnification

The Corporation shall provide approved insurance providers with indemnification, including costs and reasonable attorney fees incurred by the approved insurance provider, due to errors or omissions on the part of the Corporation.

(4) Marketing windows

The Corporation shall consider marketing windows in determining whether it is feasible to require planting during a crop year.

(5) Settlement of claims on farm-stored production

A producer with farm-stored production may, at the option of the producer, delay settlement of a crop insurance claim relating to the farm-stored production for up to 4 months after the last date on which claims may be submitted under the policy of insurance.

(k) Reinsurance

(1) In general

Notwithstanding any other provision of this subchapter, the Corporation shall, to the maximum extent practicable, provide reinsurance to insurers approved by the Corporation that insure producers of any agricultural commodity under 1 or more plans acceptable to the Corporation.

(2) Terms and conditions

The reinsurance shall be provided on such terms and conditions as the Board may determine to be consistent with subsections (b) and (c) of this section and sound reinsurance principles.

(3) Share of risk

The reinsurance agreements of the Corporation with the reinsured companies shall require the reinsured companies to bear a sufficient share of any potential loss under the agreement so as to ensure that the reinsured company will sell and service policies of insurance in a sound and prudent manner, taking into consideration the financial condition of the reinsured companies and the availability of private reinsurance.

(4) Rate

(A) In general

Except as otherwise provided in this paragraph, the rate established by the Board to reimburse approved insurance providers and agents for the administrative and operating costs of the providers and agents shall not exceed--

(i) for the 1998 reinsurance year, 27 percent of the premium used to define loss ratio; and

(ii) for each of the 1999 and subsequent reinsurance years, 24.5 percent of the premium used to define loss ratio.

(B) Proportional reductions

A policy of additional coverage that received a rate of reimbursement for administrative and operating costs for the 1998 reinsurance year that is lower than the rate specified in subparagraph (A)(i) shall receive a reduction in the rate of reimbursement that is proportional to the reduction in the rate of reimbursement between clauses (i) and (ii) of subparagraph (A).

(C) Other reductions

Beginning with the 2002 reinsurance year, in the case of a policy or plan of insurance approved by the Board that was not reinsured during the 1998 reinsurance year but, had it been reinsured, would have received a reduced rate of reimbursement during the 1998 reinsurance year, the rate of reimbursement for administrative and operating costs established for the policy or plan of insurance shall take into account the factors used to determine the rate of reimbursement for administrative and operating costs during the 1998 reinsurance year, including the expected difference in premium and actual administrative and operating costs of the policy or plan of insurance relative to an individual yield policy or plan of

insurance and other appropriate factors, as determined by the Corporation.

(D) Time for reimbursement

Effective beginning with the 2012 reinsurance year, the Corporation shall reimburse approved insurance providers and agents for the allowable administrative and operating costs of the providers and agents as soon as practicable after October 1 (but not later than October 31) after the reinsurance year for which reimbursements are earned.

(E) Reimbursement rate reduction

In the case of a policy of additional coverage that received a rate of reimbursement for administrative and operating costs for the 2008 reinsurance year, for each of the 2009 and subsequent reinsurance years, the reimbursement rate for administrative and operating costs shall be 2.3 percentage points below the rates in effect as of the date of enactment of the Food, Conservation, and Energy Act of 2008 for all crop insurance policies used to define loss ratio, except that only 1/2 of the reduction shall apply in a reinsurance year to the total premium written in a State in which the State loss ratio is greater than 1.2.

(F) Reimbursement rate for area policies and plans of insurance

Notwithstanding subparagraphs (A) through (E), for each of the 2009 and subsequent reinsurance years, the reimbursement rate for area policies and plans of insurance widely available as of the date of enactment of this subparagraph shall be 12 percent of the

premium used to define loss ratio for that reinsurance year.

(5) Cost and regulatory reduction

Consistent with section 118 of the Federal Crop Insurance Reform Act of 1994, and consistent with maintenance of program integrity, prevention of fraud and abuse, the need for program expansion, and improvement of quality of service to customers, the Board shall alter program procedures and administrative requirements in order to reduce the administrative and operating costs of approved insurance providers and agents in an amount that corresponds to any reduction in the reimbursement rate required under paragraph (4) during the 5-year period beginning on October 13, 1994.

(6) Agency discretion

The determination of whether the Corporation is achieving, or has achieved, corresponding administrative cost savings shall not be subject to administrative review, and is wholly committed to agency discretion within the meaning of section 701(a)(2) of Title 5.

(7) Plan

The Corporation shall submit to Congress a plan outlining the measures that will be used to achieve the reduction required under paragraph (5). If the Corporation can identify additional cost reduction measures, the Corporation shall describe the measures in the plan.

(8) Renegotiation of standard reinsurance agreement

(A) In general

Except as provided in subparagraph (B), notwithstanding section 536 of the Agricultural Research, Extension, and Education Reform Act of 1998 (7 U.S.C. 1506 note; Public Law 105-

185) and section 148 of the Agricultural Risk Protection Act of 2000 (7 U.S.C. 1506 note; Public Law 106-224), the Corporation may renegotiate the financial terms and conditions of each Standard Reinsurance Agreement--

(i) to be effective for the 2011 reinsurance year beginning July 1, 2010; and

(ii) once during each period of 5 reinsurance years thereafter.

(B) Exceptions

(i) Adverse circumstances

Subject to clause (ii), subparagraph (A) shall not apply in any case in which the approved insurance providers, as a whole, experience unexpected adverse circumstances, as determined by the Secretary.

(ii) Effect of Federal law changes

If Federal law is enacted after the date of enactment of this paragraph that requires revisions in the financial terms of the Standard Reinsurance Agreement, and changes in the Agreement are made on a mandatory basis by the Corporation, the changes shall not be considered to be a renegotiation of the Agreement for purposes of subparagraph (A).

(C) Notification requirement

If the Corporation renegotiates a Standard Reinsurance Agreement under subparagraph (A)(iii), [FN[2]] the Corporation shall notify the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate of the renegotiation.

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[2] So in original. Subpar. (A) does not contain a cl. (iii).

(D) Consultation

The approved insurance providers may confer with each other and collectively with the Corporation during any renegotiation under subparagraph (A).

(E) 2011 reinsurance year

(i) In general

As part of the Standard Reinsurance Agreement renegotiation authorized under subparagraph (A)(i), the Corporation shall consider alternative methods to determine reimbursement rates for administrative and operating costs.

(ii) Alternative methods

Alternatives considered under clause (i) shall include–

(I) methods that–

(aa) are graduated and base reimbursement rates in a State on changes in premiums in that State;

(bb) are graduated and base reimbursement rates in a State on the loss ratio for crop insurance for that State; and

(cc) are graduated and base reimbursement rates on individual policies on the level of total premium for each policy; and

(II) any other method that takes into account current financial conditions of the program and ensures continued availability of the program to producers on a nationwide basis.

(9) Due date for payment of underwriting gains

Effective beginning with the 2011 reinsurance year, the Corporation shall make payments for underwriting gains under this subchapter on–

(A) for the 2011 reinsurance year, October 1, 2012; and

(B) for each reinsurance year thereafter, October 1 of the following calendar year.

(l) Optional coverages

The Corporation may offer specific risk protection programs, including protection against prevented planting, wildlife depredation, tree damage and disease, and insect infestation, under such terms and conditions as the Board may determine, except that no program may be undertaken if insurance for the specific risk involved is generally available from private companies.

(m) Quality loss adjustment coverage

(1) Effect of coverage

If a policy or plan of insurance offered under this subchapter includes quality loss adjustment coverage, the coverage shall provide for a reduction in the quantity of production of the agricultural commodity considered produced during a crop year, or a similar adjustment, as a result of the agricultural commodity not meeting the quality standards established in the policy or plan of insurance.

(2) Additional quality loss adjustment

(A) Producer option

Notwithstanding any other provision of law, in addition to the quality loss adjustment coverage available under paragraph (1), the Corporation shall offer producers the option of purchasing quality loss adjustment coverage on a basis that is smaller than a unit with respect to an

agricultural commodity that satisfies each of the following:

(i) The agricultural commodity is sold on an identity-preserved basis.

(ii) All quality determinations are made solely by the Federal agency designated to grade or classify the agricultural commodity.

(iii) All quality determinations are made in accordance with standards published by the Federal agency in the Federal Register.

(iv) The discount schedules that reflect the reduction in quality of the agricultural commodity are established by the Secretary.

(B) Basis for adjustment

Under this paragraph, the Corporation shall set the quality standards below which quality losses will be paid based on the variability of the grade of the agricultural commodity from the base quality for the agricultural commodity.

(3) Review of criteria and procedures

(A) Review

The Corporation shall contract with a qualified person to review the quality loss adjustment procedures of the Corporation so that the procedures more accurately reflect local quality discounts that are applied to agricultural commodities insured under this subchapter.

(B) Procedures

Effective beginning not later than the 2004 reinsurance year, based on the review, the Corporation shall make adjustments in the procedures, taking into consideration the actuarial soundness of the adjustment and the prevention of fraud, waste, and abuse.

(4) Quality of agricultural commodities delivered to warehouse operators

In administering this subchapter, the Secretary shall accept, in the same manner and under the same terms and conditions, evidence of the quality of agricultural commodities delivered to–

(A) warehouse operators that are licensed under the United States Warehouse Act (7 U.S.C. 241 et seq.);

(B) warehouse operators that–

(i) are licensed under State law; and

(ii) have entered into a storage agreement with the Commodity Credit Corporation; and

(C) warehouse operators that–

(i) are not licensed under State law but are in compliance with State law regarding warehouses; and

(ii) have entered into a commodity storage agreement with the Commodity Credit Corporation.

(5) Special provisions for malting barley

The Corporation shall promulgate special provisions under this subsection specific to malting barley, taking into consideration any changes in quality factors, as required by applicable market conditions.

(n) Limitation on multiple benefits for same loss

(1) In general

Except as provided in paragraph (2), if a producer who is eligible to receive benefits under catastrophic risk protection under subsection (b) of this section is also eligible to receive assistance for the same loss under any other program administered by the Secretary, the producer shall be required to elect whether to receive benefits under this subchapter or under the other program, but not both. A producer who purchases additional coverage under subsection (c) of this section may

also receive assistance for the same loss under other programs administered by the Secretary, except that the amount received for the loss under the additional coverage together with the amount received under the other programs may not exceed the amount of the actual loss of the producer.

(2) Exception

Paragraph (1) shall not apply to emergency loans under subtitle C of the Consolidated Farm and Rural Development Act (7 U.S.C. 1961 et seq.).

(o) Crop production on native sod

(1) Definition of native sod

In this subsection, the term "native sod" means land–

(A) on which the plant cover is composed principally of native grasses, grasslike plants, forbs, or shrubs suitable for grazing and browsing; and

(B) that has never been tilled for the production of an annual crop as of the date of enactment of this subsection.

(2) Ineligibility for benefits

(A) In general

Subject to subparagraph (B) and paragraph (3), native sod acreage that has been tilled for the production of an annual crop after the date of enactment of this subsection shall be ineligible during the first 5 crop years of planting, as determined by the Secretary, for benefits under–

(i) this subchapter; and

(ii) section 7333 of this title.

(B) De minimis acreage exemption

The Secretary shall exempt areas of 5 acres or less from subparagraph (A).

(3) Application

Paragraph (2) may apply to native sod acreage in the Prairie Pothole National Priority Area at the election of the Governor of the respective State.

7 U.S.C. § 1508a. Double insurance and prevented planting

(a) Definitions

In this section:

(1) First crop

The term "first crop" means the first crop of the first agricultural commodity planted for harvest, or prevented from being planted, on specific acreage during a crop year and insured under this subchapter.

(2) Second crop

The term "second crop" means a second crop of the same agricultural commodity as the first crop, or a crop of a different agricultural commodity following the first crop, planted on the same acreage as the first crop for harvest in the same crop year, except the term does not include a replanted crop.

(3) Replanted crop

The term "replanted crop" means any agricultural commodity replanted on the same acreage as the first crop for harvest in the same crop year if the replanting is required by the terms of the policy of insurance covering the first crop.

(b) Double insurance

(1) Options on loss to first crop

Except as provided in subsections (d) and (e) of this section, if a first crop insured under this subchapter in a crop year has a total or partial insurable loss, the producer of the first crop may elect one of the following options:

(A) No second crop planted

The producer may–

(i) elect to not plant a second crop on the same acreage for harvest in the same crop year; and

(ii) collect an indemnity payment that is equal to 100 percent of the insurable loss for the first crop.

(B) Second crop planted

The producer may--

(i) plant a second crop on the same acreage for harvest in the same crop year; and

(ii) collect an indemnity payment established by the Corporation for the first crop, but not to exceed 35 percent of the insurable loss for the first crop.

(2) Effect of no loss to second crop

If a producer makes an election under paragraph (1)(B) and the producer does not suffer an insurable loss to the second crop, the producer may collect an indemnity payment for the first crop that is equal to--

(A) 100 percent of the insurable loss for the first crop; less

(B) the amount previously collected under paragraph (1)(B)(ii).

(3) Premium for first crop if second crop planted

(A) Initial premium

If a producer makes an election under paragraph (1)(B), the producer shall be responsible for a premium for the first crop that is commensurate with the indemnity paid under paragraph (1)(B)(ii). The Corporation shall adjust the total premium for the first crop to reflect the reduced indemnity.

(B) Effect of no loss to second crop

If the producer makes an election under paragraph (1)(B) and the producer does not

suffer an insurable loss to the second crop, the producer shall be responsible for a premium for the first crop that is equal to–

(i) the full premium owed by the producer for the first crop; less

(ii) the amount of premium previously paid under subparagraph (A).

(c) Prevented planting coverage

(1) Options on loss to first crop

Except as provided in subsections (d) and (e) of this section, if a first crop insured under this subchapter in a crop year is prevented from being planted, the producer of the first crop may elect one of the following options:

(A) No second crop planted

The producer may–

(i) elect to not plant a second crop on the same acreage for harvest in the same crop year; and

(ii) subject to paragraph (4), collect an indemnity payment that is equal to 100 percent of the prevented planting guarantee for the acreage for the first crop.

(B) Second crop planted

The producer may–

(i) plant a second crop on the same acreage for harvest in the same crop year; and

(ii) subject to paragraphs (4) and (5), collect an indemnity payment established by the Corporation for the first crop, but not to exceed 35 percent of the prevented planting guarantee for the acreage for the first crop.

(2) Premium for first crop if second planted

If the producer makes an election under paragraph (1)(B), the producer shall pay a premium for the first crop that is commensurate with the indemnity

paid under paragraph (1)(B)(ii). The Corporation shall adjust the total premium for the first crop to reflect the reduced indemnity.

(3) Effect on actual production history

Except in the case of double cropping described in subsection (d) of this section, if a producer make an election under paragraph (1)(B) for a crop year, the Corporation shall assign the producer a recorded yield for that crop year for the first crop equal to 60 percent of the producer's actual production history for the agricultural commodity involved, for purposes of determining the producer's actual production history for subsequent crop years.

(4) Area conditions required for payment

The Corporation shall limit prevented planting payments for producers to those situations in which other producers, in the area where a first crop is prevented from being planted is located, are also generally affected by the conditions that prevented the first crop from being planted.

(5) Planting date

If a producer plants the second crop before the latest planting date established by the Corporation for the first crop, the Corporation shall not make a prevented planting payment with regard to the first crop.

(d) Exception for established double cropping practices

A producer may receive full indemnity payments on two or more crops planted for harvest in the same crop year and insured under this subchapter if each of the following conditions are met:

(1) There is an established practice of planting two or more crops for harvest in the same crop year in the area, as determined by the Corporation.

(2) An additional coverage policy or plan of insurance is offered with respect to the agricultural

commodities planted on the same acreage for harvest in the same crop year in the area.

(3) The producer has a history of planting two or more crops for harvest in the same crop year or the applicable acreage has historically had two or more crops planted for harvest in the same crop year.

(4) The second or more crops are customarily planted after the first crop for harvest on the same acreage in the same year in the area.

(e) Subsequent crops

Except in the case of double cropping described in subsection (d) of this section, if a producer elects to plant a crop (other than a replanted crop) subsequent to a second crop on the same acreage as the first crop and second crop for harvest in the same crop year, the producer shall not be eligible for insurance under this subchapter, or noninsured crop assistance under section 7333 of this title, for the subsequent crop.

7 U.S.C. § 1509. Exemption of indemnities from levy

Claims for indemnities under this subchapter shall not be liable to attachment, levy, garnishment, or any other legal process before payment to the insured or to deduction on account of the indebtedness of the insured or the estate of the insured to the United States except claims of the United States or the Corporation arising under this subchapter.

7 U.S.C. § 1510. Deposit and investment of funds; Federal Reserve banks as fiscal agents

All money of the Corporation not otherwise employed may be deposited with the Treasurer of the United States or in any bank approved by the Secretary of the Treasury, subject to withdrawal by the Corporation at any time, or with the approval of the Secretary of the

Treasury may be invested in obligations of the United States or in obligations guaranteed as to principal and interest by the United States. Subject to the approval of the Secretary of the Treasury, the Federal Reserve banks are hereby authorized and directed to act as depositories, custodians, and fiscal agents for the Corporation in the performance of its powers conferred by this subchapter.

7 U.S.C. § 1511. Tax exemption

The Corporation, including its franchise, its capital, reserves, and surplus, and its income and property, shall be exempt from all taxation on or after February 16, 1938, imposed by the United States or by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. A contract of insurance of the Corporation, and a contract of insurance reinsured by the Corporation, shall be exempt from taxation imposed by any State, municipality, or local taxing authority.

7 U.S.C. § 1512. Corporation as fiscal agent of Government

When designated for that purpose by the Secretary of the Treasury, the Corporation shall be a depository of public money, except receipts from customs, under such regulations as may be prescribed by said Secretary; and it may also be employed as a financial agent of the Government; and it shall perform all such reasonable duties, as a depository of public money and financial agent of the Government, as may be required of it.

7 U.S.C. § 1513. Books of account and annual reports of Corporation

The Corporation shall at all times maintain complete and accurate books of accounts and shall file annually with the Secretary a complete report as to the business of the Corporation.

7 U.S.C. § 1514. Crimes and offenses

(a) to (e) Repealed. June 25, 1948, c. 645, § 21, 62 Stat. 862, eff. Sept. 1, 1948

(f) Application of laws on interest of Members of Congress in contracts

The provisions of section 22 of Title 41 shall not apply to any crop insurance agreements made under this subchapter.

7 U.S.C. § 1515. Program compliance and integrity

(a) Purpose

(1) In general

The purpose of this section is to improve compliance with, and the integrity of, the Federal crop insurance program.

(2) Role of insurance providers

The Corporation shall work actively with approved insurance providers to address program compliance and integrity issues as such issues develop.

(b) Notification of compliance problems

(1) Notification of errors, omissions, and failures

The Corporation shall notify in writing an approved insurance provider of any error, omission, or failure to follow Corporation regulations or procedures for which the approved insurance provider may be responsible and which may result in a debt owed the Corporation.

(2) Time for notification

Notice under paragraph (1) shall be given within 3 years after the end of the insurance period during which the error, omission, or failure is alleged to have occurred, except that this time limitation shall not apply with respect to an error, omission, or procedural violation that is willful or intentional.

(3) Effect of failure to timely notify

Except as provided in paragraph (2), the failure to timely provide the notice required under this subsection shall relieve the approved insurance provider from the debt owed the Corporation.

(c) Reconciling producer information

The Secretary shall develop and implement a coordinated plan for the Corporation and the Farm Service Agency to reconcile all relevant information received by the Corporation or the Farm Service Agency from a producer who obtains crop insurance coverage under this subchapter. Beginning with the 2001 crop year, the Secretary shall require that the Corporation and the Farm Service Agency reconcile such producer-derived information on at least an annual basis in order to identify and address any discrepancies.

(d) Identification and elimination of fraud, waste, and abuse

(1) FSA monitoring program

The Secretary shall develop and implement a coordinated plan for the Farm Service Agency to assist the Corporation in the ongoing monitoring of programs carried out under this subchapter, including–

(A) at the request of the Corporation or, subject to paragraph (2), on its own initiative if the Farm Service Agency has reason to suspect the existence of program fraud, waste, or abuse,

conducting fact finding relative to allegations of program fraud, waste, or abuse;

(B) reporting to the Corporation, in writing in a timely manner, the results of any fact finding conducted pursuant to subparagraph (A), any allegation of fraud, waste, or abuse, and any identified program vulnerabilities; and

(C) assisting the Corporation and approved insurance providers in auditing a statistically appropriate number of claims made under any policy or plan of insurance under this subchapter.

(2) FSA inquiry

If, within five calendar days after receiving a report submitted under paragraph (1)(B), the Corporation does not provide a written response that describes the intended actions of the Corporation, the Farm Service Agency may conduct its own inquiry into the alleged program fraud, waste, or abuse on approval from the State director of the Farm Service Agency of the State in which the alleged fraud, waste, or abuse occurred. If as a result of the inquiry, the Farm Service Agency concludes further investigation is warranted, but the Corporation declines to proceed with the investigation, the Farm Service Agency may refer the matter to the Inspector General of the Department of Agriculture.

(3) Use of field infrastructure

The plan required by paragraph (1) shall provide for the use of the field infrastructure of the Farm Service Agency. The Secretary shall ensure that relevant Farm Service Agency personnel are appropriately trained for any responsibilities assigned to the personnel under the plan. At a minimum, the personnel shall receive the same

level of training and pass the same basic competency tests as required of loss adjusters of approved insurance providers.

(4) Maintenance of provider effort

(A) In general

The activities of the Farm Service Agency under this subsection do not affect the responsibility of approved insurance providers to conduct any audits of claims or other program reviews required by the Corporation.

(B) Notification of providers

The Corporation shall notify the appropriate approved insurance provider of a report from the Farm Service Agency regarding alleged program fraud, waste, or abuse, unless the provider is suspected to be included in, or a party to, the alleged fraud, waste, or abuse.

(C) Response

An approved insurance provider that receives a notice under subparagraph (B) shall submit a report to the Corporation, within an appropriate time period determined by the Secretary, describing the actions taken by the provider to investigate the allegations of program fraud, waste, or abuse contained in the notice.

(5) Corporation response to provider reports

(A) Prompt response

If an approved insurance provider reports to the Corporation that the approved insurance provider suspects intentional misrepresentation, fraud, waste, or abuse, the Corporation shall make a determination and provide, within 90 calendar days after receiving the report, a written response that describes the intended actions of the Corporation.

(B) Cooperative effort

The approved insurance provider and the Corporation shall take coordinated action in any case where misrepresentation, fraud, waste, or abuse is alleged.

(C) Failure to timely respond

If the Corporation fails to respond as required by subparagraph (A), an approved insurance provider may request the Farm Service Agency to assist the provider in an inquiry into the alleged program fraud, waste, or abuse.

(e) Consultation with State FSA committees

The Secretary shall establish procedures under which the Corporation shall consult with the State committee of the Farm Service Agency for a State with respect to policies, plans of insurance, and material related to such policies or plans of insurance (including applicable sales closing dates, assigned yields, and transitional yields) offered in that State under this subchapter.

(f) Detection of disparate performance

(1) Covered activities

The Secretary shall establish procedures under which the Corporation will be able to identify the following:

(A) Any agent engaged in the sale of coverage offered under this subchapter where the loss claims associated with such sales by the agent are equal to or greater than 150 percent (or an appropriate percentage specified by the Corporation) of the mean for all loss claims associated with such sales by all other agents operating in the same area, as determined by the Corporation.

(B) Any person performing loss adjustment services relative to coverage offered under this subchapter where such loss adjustments

performed by the person result in accepted or denied claims equal to or greater than 150 percent (or an appropriate percentage specified by the Corporation) of the mean for accepted or denied claims (as applicable) for all other persons performing loss adjustment services in the same area, as determined by the Corporation.

(2) Review

(A) Review required

The Corporation shall conduct a review of any agent identified pursuant to paragraph (1)(A), and any person identified pursuant to paragraph (1)(B), to determine whether the higher loss claims associated with the agent or the higher number of accepted or denied claims (as applicable) associated with the person are the result of fraud, waste, or abuse.

(B) Remedial action

The Corporation shall take appropriate remedial action with respect to any occurrence of fraud, waste, or abuse identified in a review conducted under this paragraph.

(3) Oversight of agents and loss adjusters

The Corporation shall develop procedures to require an annual review by an approved insurance provider of the performance of each agent and loss adjuster used by the approved insurance provider. The Corporation shall oversee the conduct of annual reviews and may consult with an approved insurance provider regarding any remedial action that is determined to be necessary as a result of the annual review of an agent or loss adjuster.

(g) Submission of information to Corporation to support compliance efforts

(1) Types of information required

The Secretary shall establish procedures under which approved insurance providers shall submit to the Corporation the following information with respect to each policy or plan of insurance offered under this subchapter:

(A) The name and identification number of the insured.

(B) The agricultural commodity to be insured.

(C) The elected coverage level, including the price election, of the insured.

(2) Time for submission

The information required by paragraph (1) with respect to a policy or plan of insurance shall be submitted so as to ensure receipt by the Corporation not later than the Saturday of the week containing the calendar day that is 30 days after the applicable sales closing date for the crop to be insured.

(h) Sanctions for program noncompliance and fraud

(1) False information

A producer, agent, loss adjuster, approved insurance provider, or other person that willfully and intentionally provides any false or inaccurate information to the Corporation or to an approved insurance provider with respect to a policy or plan of insurance under this subchapter may, after notice and an opportunity for a hearing on the record, be subject to one or more of the sanctions described in paragraph (3).

(2) Compliance

A person may, after notice and an opportunity for a hearing on the record, be subject to one or more of the sanctions described in paragraph (3) if the person is a producer, agent, loss adjuster, approved insurance provider, or other person that willfully

and intentionally fails to comply with a requirement of the Corporation.

(3) Authorized sanctions

If the Secretary determines that a person covered by this subsection has committed a material violation under paragraph (1) or (2), the following sanctions may be imposed:

(A) Civil fines

A civil fine may be imposed for each violation in an amount not to exceed the greater of–

(i) the amount of the pecuniary gain obtained as a result of the false or inaccurate information provided or the noncompliance with a requirement of this subchapter; or

(ii) $10,000.

(B) Producer disqualification

In the case of a violation committed by a producer, the producer may be disqualified for a period of up to 5 years from receiving any monetary or nonmonetary benefit provided under each of the following:

(i) This subchapter.

(ii) The Agricultural Market Transition Act (7 U.S.C. 7201 et seq.), including the noninsured crop disaster assistance program under section 196 of that Act (7 U.S.C. 7333).

(iii) The Agricultural Act of 1949 (7 U.S.C. 1421 et seq.).

(iv) The Commodity Credit Corporation Charter Act (15 U.S.C. 714 et seq.).

(v) The Agricultural Adjustment Act of 1938 (7 U.S.C. 1281 et seq.).

(vi) Title XII of the Food Security Act of 1985 (16 U.S.C. 3801 et seq.).

(vii) The Consolidated Farm and Rural Development Act (7 U.S.C. 1921 et seq.).

(viii) Any law that provides assistance to a producer of an agricultural commodity affected by a crop loss or a decline in the prices of agricultural commodities.

(C) Disqualification of other persons

In the case of a violation committed by an agent, loss adjuster, approved insurance provider, or other person (other than a producer), the violator may be disqualified for a period of up to 5 years from participating in any program, or receiving any benefit, under this subchapter.

(4) Assessment of sanction

The Secretary shall consider the gravity of the violation of the person covered by this subsection in determining–

(A) whether to impose a sanction under this subsection; and

(B) the type and amount of the sanction to be imposed.

(5) Disclosure of sanctions

Each policy or plan of insurance under this subchapter shall provide notice describing the sanctions prescribed under paragraph (3) for willfully and intentionally–

(A) providing false or inaccurate information to the Corporation or to an approved insurance provider; or

(B) failing to comply with a requirement of the Corporation.

(6) Insurance fund

Any funds collected under this subsection shall be deposited into the insurance fund established under section 1516(c) of this title.

(i) Annual report on program compliance and integrity efforts

(1) Report required

The Secretary shall submit to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate an annual report describing the operation of this section during the preceding year and efforts undertaken by the Secretary and the Corporation to carry out this section.

(2) Information regarding fraud, waste, and abuse

The report shall identify specific occurrences of waste, fraud, or abuse and contain an outline of actions that have been or are being taken to eliminate the identified waste, fraud, or abuse.

(j) Information management

(1) Systems upgrades

The Secretary shall upgrade the information management systems of the Corporation used in the administration and enforcement and this subchapter. In upgrading the systems, the Secretary shall ensure that new hardware and software are compatible with the hardware and software used by other agencies of the Department to maximize data sharing and promote the purpose of this section.

(2) Use of available information technologies

The Secretary shall use the information technologies known as data mining and data warehousing and other available information technologies to administer and enforce this subchapter.

(3) Use of private sector

The Secretary may enter into contracts to use private sector expertise and technological resources in implementing this subsection, which shall be subject to competition on a periodic basis, as determined by the Secretary.

(k) Funding

(1) Information technology

To carry out subsection (j)(1), the Corporation may use, from amounts made available from the insurance fund established under section 1516(c) of this title, not more than $15,000,000 for each of fiscal years 2008 through 2010, and not more than $9,000,000 for fiscal year 2011.

(2) Data mining

To carry out subsection (j)(2), the Corporation may use, from amounts made available from the insurance fund established under section 1516(c) of this title, not more than $4,000,000 for fiscal year 2009 and each subsequent fiscal year.

7 U.S.C. § 1516. Funding

(a) Authorization of appropriations

(1) Discretionary expenses

There are authorized to be appropriated for fiscal year 1999 and each subsequent fiscal year such sums as are necessary to cover the salaries and expenses of the Corporation.

(2) Mandatory expenses

There are authorized to be appropriated such sums as are necessary to cover for each of the 1999 and subsequent reinsurance years the following:

(A) The administrative and operating expenses of the Corporation for the sales commissions of agents.

(B) Premium subsidies, including the administrative and operating expenses of an approved insurance provider for the delivery of policies with additional coverage.

(C) Costs associated with the conduct of livestock and wild salmon pilot programs carried out under ection 1523 of this title, subject to the limitations in subsections

(a)(3)(E)(ii) and (b)(10) of section 1523 of this title.

(D) Costs associated with the reimbursement, contracting, and partnerships for research and development under section 1522 of this title.

(b) Payment of Corporation expenses from insurance fund

(1) Expenses generally

For each of the 1999 and subsequent reinsurance years, the Corporation may pay from the insurance fund established under subsection (c) of this section all expenses of the Corporation (other than expenses covered by subsection (a)(1) of this section and expenses covered by paragraph (2)(A)), including the following:

(A) Premium subsidies and indemnities.

(B) Administrative and operating expenses of the Corporation necessary to pay the sales commissions of agents.

(C) All administrative and operating expense reimbursements due under a reinsurance agreement with an approved insurance provider.

(D) Costs associated with the conduct of livestock and wild salmon pilot programs carried out under section 1523 of this title, subject to the limitations in subsections (a)(3)(E)(ii) and (b)(10) of section 1523 of this title.

(E) Costs associated with the reimbursement, contracting, and partnerships for research and development under section 1522 of this title.

(2) Policy consideration and implementation

(A) In general

For each of the 1999 and subsequent reinsurance years, the Corporation may use the

insurance fund established under subsection (c) of this section, but not to exceed $3,500,000 for each fiscal year, to pay the following:

(i) Costs associated with the consideration and implementation of policies, plans of insurance, and related materials submitted under section 1508(h) of this title or developed under section 1522 or 1523 of this title.

(ii) Costs to contract for the review of policies, plans of insurance, and related materials under section 1505(e) of this title and to contract for other assistance in considering policies, plans of insurance, and related materials.

(B) Dairy options pilot program

Amounts necessary to carry out the dairy options pilot program shall not be counted toward the limitation on expenses specified in subparagraph (A).

(c) Insurance fund

(1) In general

There is established an insurance fund, for the deposit of premium income, amounts made available under subsection (a)(2) of this section, and civil fines collected under section 1515(h) of this title, to be available without fiscal year limitation.

(2) Commodity Credit Corporation funds

If at any time the amounts in the insurance fund are insufficient to enable the Corporation to carry out subsection (b) of this section, to the extent the funds of the Commodity Credit Corporation are available--

(A) the Corporation may request the Secretary to use the funds of the Commodity Credit

Corporation to carry out subsection (b) of this section; and

(B) the Secretary may use the funds of the Commodity Credit Corporation to carry out subsection (b) of this section.

7 U.S.C. § 1517. Separability

The sections of this subchapter and subdivisions of sections are declared to be separable, and in the event any one or more sections or parts of the same of this subchapter be held to be unconstitutional, the same shall not affect the validity of other sections or parts of sections of this subchapter.

7 U.S.C. § 1518. "Agricultural commodity" defined

"Agricultural commodity", as used in this subchapter, means wheat, cotton, flax, corn, dry beans, oats, barley, rye, tobacco, rice, peanuts, soybeans, sugar beets, sugar cane, tomatoes, grain sorghum, sunflowers, raisins, oranges, sweet corn, dry peas, freezing and canning peas, forage, apples, grapes, potatoes, timber and forests, nursery crops, citrus, and other fruits and vegetables, nuts, tame hay, native grass, aquacultural species (including, but not limited to, any species of finfish, mollusk, crustacean, or other aquatic invertebrate, amphibian, reptile, or aquatic plant propagated or reared in a controlled or selected environment), or any other agricultural commodity, excluding stored grain, determined by the Board, or any one or more of such commodities, as the context may indicate.

7 U.S.C. § 1519. Repealed. Pub.L. 104-127, Title I, § 196(j), Apr. 4, 1996, 110 Stat. 950

7 U.S.C. § 1520. Producer eligibility

Except as otherwise provided in this subchapter, a producer shall not be denied insurance under this subchapter if–

(1) for purposes of catastrophic risk protection coverage, the producer is a "person" (as defined by the Secretary); and

(2) for purposes of any other plan of insurance, the producer is 18 years of age and has a bona fide insurable interest in a crop as an owner-operator, landlord, tenant, or sharecropper.

7 U.S.C. § 1521. Ineligibility for catastrophic risk and noninsured assistance payments

If the Secretary determines that a person has knowingly adopted a material scheme or device to obtain catastrophic risk, additional coverage, or noninsured assistance benefits under this subchapter to which the person is not entitled, has evaded this subchapter, or has acted with the purposes of evading this subchapter, the person shall be ineligible to receive all benefits applicable to the crop year for which the scheme or device was adopted.

7 U.S.C. § 1522. Research and development

(a) Definition of policy

In this section, the term "policy" means a policy, plan of insurance, provision of a policy or plan of insurance, and related materials.

(b) Reimbursement of research, development, and maintenance costs

(1) Research and development payment

(A) In general

The Corporation shall provide a payment to an applicant for research and development costs in accordance with this subsection.

(B) Reimbursement

An applicant who submits a policy under section 1508(h) of this title shall be eligible for the reimbursement of reasonable research and development costs directly related to the policy if the policy is approved by the Board for sale to producers.

(2) Advance payments

(A) In general

Subject to the other provisions of this paragraph, the Board may approve the request of an applicant for advance payment of a portion of reasonable research and development costs prior to submission and approval of the policy by the Board under section 1508(h) of this title.

(B) Procedures

The Board shall establish procedures for approving advance payment of reasonable research and development costs to applicants.

(C) Concept proposal

As a condition of eligibility for advance payments, an applicant shall submit a concept proposal for the policy that the applicant plans to submit to the Board under section 1508(h) of this title, consistent with procedures established by the Board for submissions under subparagraph (B), including--

(i) a summary of the qualifications of the applicant, including any prior concept proposals and submissions to the Board under section 1508(h) of this title and, if applicable, any work conducted under this section;

(ii) a projection of total research and development costs that the applicant expects to incur;

(iii) a description of the need for the policy, the marketability of and expected demand for the policy among affected producers, and the potential impact of the policy on producers and the crop insurance delivery system;

(iv) a summary of data sources available to demonstrate that the policy can reasonably be developed and actuarially appropriate rates established; and

(v) an identification of the risks the proposed policy will cover and an explanation of how the identified risks are insurable under this subchapter.

(D) Review

(i) Experts

If the requirements of subparagraph (B) and (C) are met, the Board may submit a concept proposal described in subparagraph (C) to not less than 2 independent expert reviewers, whose services are appropriate for the type of concept proposal submitted, to assess the likelihood that the proposed policy being developed will result in a viable and marketable policy, as determined by the Board.

(ii) Timing

The time frames described in subparagraphs (C) and (D) of section 1508(h)(4) of this title shall apply to the review of concept proposals under this subparagraph.

(E) Approval

The Board may approve up to 50 percent of the projected total research and development costs to be paid in advance to an applicant, in accordance with the procedures developed by

the Board for the making of such payments, if, after consideration of the reviewer reports described in subparagraph (D) and such other information as the Board determines appropriate, the Board determines that–

(i) the concept, in good faith, will likely result in a viable and marketable policy consistent with section 1508(h) of this title;

(ii) in the sole opinion of the Board, the concept, if developed into a policy and approved by the Board, would provide crop insurance coverage–

(I) in a significantly improved form;

(II) to a crop or region not traditionally served by the Federal crop insurance program; or

(III) in a form that addresses a recognized flaw or problem in the program;

(iii) the applicant agrees to provide such reports as the Corporation determines are necessary to monitor the development effort;

(iv) the proposed budget and timetable are reasonable; and

(v) the concept proposal meets any other requirements that the Board determines appropriate.

(F) Submission of policy

If the Board approves an advanced payment under subparagraph (E), the Board shall establish a date by which the applicant shall present a submission in compliance with section 1508(h) of this title (including the procedures implemented under that section) to the Board for approval.

(G) Final payment

(i) Approved policies

If a policy is submitted under subparagraph (F) and approved by the Board under section 1508(h) of this title and the procedures established by the Board (including procedures established under subparagraph (B)), the applicant shall be eligible for a payment of reasonable research and development costs in the same manner as policies reimbursed under paragraph (1)(B), less any payments made pursuant to subparagraph (E).

(ii) Policies not approved

If a policy is submitted under subparagraph (F) and is not approved by the Board under section 1508(h) of this title, the Corporation shall–

(I) not seek a refund of any payments made in accordance with this paragraph; and

(II) not make any further research and development cost payments associated with the submission of the policy under this paragraph.

(H) Policy not submitted

If an applicant receives an advance payment and fails to fulfill the obligation of the applicant to the Board by not submitting a completed submission without just cause and in accordance with the procedures established under subparagraph (B)), including notice and reasonable opportunity to respond, as determined by the Board, the applicant shall return to the Board the amount of the advance plus interest.

(I) Repeated submissions

The Board may prohibit advance payments to applicants who have submitted--

(i) a concept proposal or submission that did not result in a marketable product; or

(ii) a concept proposal or submission of poor quality.

(J) Continued eligibility

A determination that an applicant is not eligible for advance payments under this paragraph shall not prevent an applicant from reimbursement under paragraph (1)(B).

(3) Marketability

The Corporation shall approve a reimbursement under paragraph (1) only after determining that the policy is marketable based on a reasonable marketing plan, as determined by the Board.

(4) Maintenance payments

(A) Requirement

The Corporation shall reimburse maintenance costs associated with the annual cost of underwriting for a policy described in paragraphs [FN[1]] (1).

(B) Duration

Payments with respect to maintenance costs may be provided for a period of not more than four reinsurance years subsequent to Board approval for payment under this subsection.

(C) Options for maintenance

On the expiration of the 4-year period described in subparagraph (B), the approved insurance provider responsible for maintenance of the policy may--

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[1] So in original. Probably should read "paragraph".

(i) maintain the policy and charge a fee to approved insurance providers that elect to sell the policy under this subsection; or

(ii) transfer responsibility for maintenance of the policy to the Corporation.

(D) Fee

(i) Amount

Subject to approval by the Board, the amount of the fee that is payable by an approved insurance provider that elects to sell the policy shall be an amount that is determined by the approved insurance provider maintaining the policy.

(ii) Approval

The Board shall approve the amount of a fee determined under clause (i) for maintenance of the policy unless the Board determines that the amount of the fee–

(I) is unreasonable in relation to the maintenance costs associated with the policy; or

(II) unnecessarily inhibits the use of the policy.

(5) Treatment of payment

Payments made under this subsection for a policy shall be considered as payment in full by the Corporation for the research and development conducted with regard to the policy and any property rights to the policy.

(6) Reimbursement amount

The Corporation shall determine the amount of the payment under this subsection for an approved policy based on the complexity of the policy and the size of the area in which the policy or material is expected to be sold.

(c) Research and development contracting authority

(1) Authority

The Corporation may enter into contracts to carry out research and development to–

(A) increase participation in States in which the Corporation determines that–

(i) there is traditionally, and continues to be, a low level of Federal crop insurance participation and availability; and

(ii) the State is underserved by the Federal crop insurance program;

(B) increase participation in areas that are underserved by the Federal crop insurance program; and

(C) increase participation by producers of underserved agricultural commodities, including specialty crops.

(2) Underserved agricultural commodities and areas

(A) Authority

The Corporation may enter into contracts under procedures prescribed by the Corporation with qualified persons to carry out research and development for policies that promote the purposes of paragraph (1).

(B) Consultation

Before entering into a contract under subparagraph (A), the Corporation shall consult with groups representing producers of agricultural commodities that would be served by the policies that are the subject of the research and development.

(3) Qualified persons

A person with experience in crop insurance or farm or ranch risk management (including a college or university, an approved insurance provider, and a trade or research organization), as determined by

the Corporation, shall be eligible to enter into a contract with the Corporation under this subsection.

(4) Types of contracts

A contract under this subsection may provide for research and development regarding new or expanded policies, including policies based on adjusted gross income, cost-of-production, quality losses, and an intermediate base program with a higher coverage and cost than catastrophic risk protection.

(5) Use of resulting policies

The Corporation may offer any policy developed under this subsection that is approved by the Board.

(6) Research and development priorities

The Corporation shall establish as one of the highest research and development priorities of the Corporation the development of a pasture, range, and forage program.

(7) Study of multiyear coverage

(A) In general

The Corporation shall contract with a qualified person to conduct a study to determine whether offering policies that provide coverage for multiple years would reduce fraud, waste, and abuse by persons that participate in the Federal crop insurance program.

(B) Report

Not later than 1 year after June 20, 2000, the Corporation shall submit to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate a report that describes the results of the study conducted under subparagraph (A).

(8) Contract for revenue coverage plans

The Corporation shall enter into a contract for research and development regarding one or more revenue coverage plans that are designed to enable producers to take maximum advantage of fluctuations in market prices and thereby maximize revenue realized from the sale of an agricultural commodity. A revenue coverage plan may include the use of existing market instruments or the development of new market instruments. Not later than 15 months after June 20, 2000, the Corporation shall submit to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate a report that describes the results of the contract entered into under this paragraph.

(9) Contract for cost of production policy

(A) Authority

The Corporation shall enter into a contract for research and development regarding a cost of production policy.

(B) Research and development

The research and development shall–

(i) take into consideration the differences in the cost of production on a county-by-county basis; and

(ii) cover as many commodities as is practicable.

(10) Contracts for organic production coverage improvements

(A) Contracts required

Not later than 180 days after the date of enactment of the Food, Conservation, and Energy Act of 2008, the Corporation shall enter into 1 or more contracts for the development of improvements in Federal crop insurance policies

covering crops produced in compliance with standards issued by the Department of Agriculture under the national organic program established under the Organic Foods Production Act of 1990 (7 U.S.C. 6501 et seq.).

(B) Review of underwriting risk and loss experience

(i) Review required

(I) In general

A contract under subparagraph (A) shall include a review of the underwriting, risk, and loss experience of organic crops covered by the Corporation, as compared with the same crops produced in the same counties and during the same crop years using nonorganic methods.

(II) Requirements

The review shall–

(aa) to the maximum extent practicable, be designed to allow the Corporation to determine whether significant, consistent, or systemic variations in loss history exist between organic and nonorganic production;

(bb) include the widest available range of data collected by the Secretary and other outside sources of information; and

(cc) not be limited to loss history under existing crop insurance policies.

(ii) Effect on premium surcharge

Unless the review under this subparagraph documents the existence of significant, consistent, and systemic variations in loss history between organic and nonorganic

crops, either collectively or on an individual crop basis, the Corporation shall eliminate or reduce the premium surcharge that the Corporation charges for coverage for organic crops, as determined in accordance with the results.

(iii) Annual updates

Beginning with the 2009 crop year, the review under this subparagraph shall be updated on an annual basis as data is accumulated by the Secretary and other sources, so that the Corporation may make determinations regarding adjustments to the surcharge in a timely manner as quickly as evolving practices and data trends allow.

(C) Additional price election

(i) In general

A contract under subparagraph (A) shall include the development of a procedure, including any associated changes in policy terms or materials required for implementation of the procedure, to offer producers of organic crops an additional price election that reflects actual prices received by organic producers for crops from the field (including appropriate retail and wholesale prices), as established using data collected and maintained by the Secretary or from other sources.

(ii) Timing

The development of the procedure shall be completed in a timely manner to allow the Corporation to begin offering the additional price election for organic crops with sufficient data for the 2010 crop year.

(iii) Expansion

The procedure shall be expanded as quickly as practicable as additional data on prices of organic crops collected by the Secretary and other sources of information becomes available, with a goal of applying this procedure to all organic crops not later than the fifth full crop year that begins after the date of enactment of Food, Conservation, and Energy Act of 2008.

(D) Reporting requirements

(i) In general

The Corporation shall submit to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate an annual report on progress made in developing and improving Federal crop insurance for organic crops, including--

(I) the numbers and varieties of organic crops insured;

(II) the development of new insurance approaches; and

(III) the progress of implementing the initiatives required under this paragraph, including the rate at which additional price elections are adopted for organic crops.

(ii) Recommendations

The report shall include such recommendations as the Corporation considers appropriate to improve Federal crop insurance coverage for organic crops.

(11) Energy crop insurance policy

(A) Definition of dedicated energy crop

In this subsection, the term "dedicated energy crop" means an annual or perennial crop that--

(i) is grown expressly for the purpose of producing a feedstock for renewable biofuel, renewable electricity, or biobased products; and

(ii) is not typically used for food, feed, or fiber.

(B) Authority

The Corporation shall offer to enter into 1 or more contracts with qualified entities to carry out research and development regarding a policy to insure dedicated energy crops.

(C) Research and development

Research and development described in subparagraph (B) shall evaluate the effectiveness of risk management tools for the production of dedicated energy crops, including policies and plans of insurance that--

(i) are based on market prices and yields;

(ii) to the extent that insufficient data exist to develop a policy based on market prices and yields, evaluate the policies and plans of insurance based on the use of weather or rainfall indices to protect the interests of crop producers; and

(iii) provide protection for production or revenue losses, or both.

(12) Aquaculture insurance policy

(A) Definition of aquaculture

In this subsection:

(i) In general

The term "aquaculture" means the propagation and rearing of aquatic species in controlled or selected environments, including shellfish cultivation on grants or leased bottom and ocean ranching.

(ii) Exclusion

The term "aquaculture" does not include the private ocean ranching of Pacific salmon for profit in any State in which private ocean ranching of Pacific salmon is prohibited by any law (including regulations).

(B) Authority

(i) In general

As soon as practicable after the date of enactment of the Food, Conservation, and Energy Act of 2008, the Corporation shall offer to enter into 3 or more contracts with qualified entities to carry out research and development regarding a policy to insure the production of aquacultural species in aquaculture operations.

(ii) Bivalve species

At least 1 of the contracts described in clause (i) shall address insurance of bivalve species, including--

(I) American oysters (crassostrea virginica);

(II) hard clams (mercenaria mercenaria);

(III) Pacific oysters (crassostrea gigas);

(IV) Manila clams (tapes phillipinnarium); or

(V) blue mussels (mytilus edulis).

(iii) Freshwater species

At least 1 of the contracts described in clause (i) shall address insurance of freshwater species, including--

(I) catfish (icataluridae);

(II) rainbow trout (oncorhynchus mykiss);

(III) largemouth bass (micropterus salmoides);

(IV) striped bass (morone saxatilis);

(V) bream (abramis brama);

(VI) shrimp (penaeus); or

(VII) tilapia (oreochromis niloticus).

(iv) Saltwater species

At least 1 of the contracts described in clause (i) shall address insurance of saltwater species, including--

(I) Atlantic salmon (salmo salar); or

(II) shrimp (penaeus).

(C) Research and development

Research and development described in subparagraph (B) shall evaluate the effectiveness of policies and plans of insurance for the production of aquacultural species in aquaculture operations, including policies and plans of insurance that--

(i) are based on market prices and yields;

(ii) to the extent that insufficient data exist to develop a policy based on market prices and yields, evaluate how best to incorporate insuring of production of aquacultural species in aquaculture operations into existing policies covering adjusted gross revenue; and

(iii) provide protection for production or revenue losses, or both.

(13) Poultry insurance policy

(A) Definition of poultry

In this paragraph, the term "poultry" has the meaning given the term in section 182 of this title.

(B) Authority

The Corporation shall offer to enter into 1 or more contracts with qualified entities to carry out research and development regarding a policy to insure commercial poultry production.

(C) Research and development

Research and development described in subparagraph (B) shall evaluate the effectiveness of risk management tools for the production of poultry, including policies and plans of insurance that provide protection for production or revenue losses, or both, while the poultry is in production.

(14) Apiary policies

The Corporation shall offer to enter into a contract with a qualified entity to carry out research and development regarding insurance policies that cover loss of bees.

(15) Adjusted gross revenue policies for beginning producers

The Corporation shall offer to enter into a contract with a qualified entity to carry out research and development into needed modifications of adjusted gross revenue insurance policies, consistent with principles of actuarial sufficiency, to permit coverage for beginning producers with no previous production history, including permitting those producers to have production and premium rates based on information with similar farming operations.

(16) Skiprow cropping practices

(A) In general

The Corporation shall offer to enter into a contract with a qualified entity to carry out research into needed modifications of policies to insure corn and sorghum produced in the Central Great Plains (as determined by the Agricultural Research Service) through use of skiprow cropping practices.

(B) Research

Research described in subparagraph (A) shall–

(i) review existing research on skiprow cropping practices and actual production history of producers using skiprow cropping practices; and

(ii) evaluate the effectiveness of risk management tools for producers using skiprow cropping practices, including–

(I) the appropriateness of rules in existence as of the date of enactment of this paragraph relating to the determination of acreage planted in skiprow patterns; and

(II) whether policies for crops produced through skiprow cropping practices reflect actual production capabilities.

(17) Relation to limitations

A policy developed under this subsection may be prepared without regard to the limitations of this subchapter, including–

(A) the requirement concerning the levels of coverage and rates; and

(B) the requirement that the price level for each insured agricultural commodity must equal the expected market price for the agricultural commodity, as established by the Board.

(d) Partnerships for risk management development and implementation

(1) Purpose

The purpose of this subsection is to authorize the Corporation to enter into partnerships with public and private entities for the purpose of increasing the availability of loss mitigation, financial, and other risk management tools for producers, with a priority given to risk management tools for producers of agricultural commodities covered by

section 7333 of this title, specialty crops, and underserved agricultural commodities.

(2) Authority

The Corporation may enter into partnerships with the National Institute of Food and Agriculture, the Agricultural Research Service, the National Oceanic Atmospheric Administration, and other appropriate public and private entities with demonstrated capabilities in developing and implementing risk management and marketing options for producers of specialty crops and underserved agricultural commodities.

(3) Objectives

The Corporation may enter into a partnership under paragraph (2)--

(A) to enhance the notice and timeliness of notice of weather conditions that could negatively affect crop yields, quality, and final product use in order to allow producers to take preventive actions to increase end product profitability and marketability and to reduce the possibility of crop insurance claims;

(B) to develop a multifaceted approach to pest management and fertilization to decrease inputs, decrease environmental exposure, and increase application efficiency;

(C) to develop or improve techniques for planning, breeding, planting, growing, maintaining, harvesting, storing, shipping, and marketing that will address quality and quantity challenges associated with year-to-year and regional variations;

(D) to clarify labor requirements and assist producers in complying with requirements to better meet the physically intense and time-compressed planting, tending, and harvesting

requirements associated with the production of specialty crops and underserved agricultural commodities;

(E) to provide assistance to State foresters or equivalent officials for the prescribed use of burning on private forest land for the prevention, control, and suppression of fire;

(F) to provide producers with training and informational opportunities so that the producers will be better able to use financial management, crop insurance, marketing contracts, and other existing and emerging risk management tools; and

(G) to develop other risk management tools to further increase economic and production stability.

(e) Funding

(1) Reimbursements

Of the amounts made available from the insurance fund established under section 1516(c) of this title, the Corporation may use to provide reimbursements under subsection (b) of this section not more than $7,500,000 for fiscal year 2008 and each subsequent fiscal year [FN[2]]

(2) Contracting

(A) Authority

Of the amounts made available from the insurance fund established under section 1516(c) of this title, the Corporation may use to carry out contracting and partnerships under subsections (c) and (d) of this section not more than $12,500,000 for fiscal year 2008 and each subsequent fiscal year.

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[2] So in original. Probably should be followed by a period.

(B) Underserved States

Of the amount made available under subparagraph (A) for a fiscal year, the Corporation shall use not more than $5,000,000 for the fiscal year to carry out contracting for research and development to carry out the purpose described in subsection (c)(1)(A) of this section.

(3) Unused funding

If the Corporation determines that the amount available to provide either reimbursement payments or contract payments under this section for a fiscal year is not needed for such purposes, the Corporation may use–

(A) not more than $5,000,000 for each fiscal year to improve program integrity, including by–

(i) increasing compliance-related training;

(ii) improving analysis tools and technology regarding compliance;

(iii) use of information technology, as determined by the Corporation; and

(iv) identifying and using innovative compliance strategies; and

(B) any excess amounts to carry out other activities authorized under this section.

(4) Prohibited research and development by Corporation

(A) New policies

Notwithstanding subsection (d) of this section, on and after October 1, 2000, the Corporation shall not conduct research and development for any new policy for an agricultural commodity offered under this subchapter.

(B) Existing policies

Any policy developed by the Corporation under this subchapter before that date may continue to be offered for sale to producers.

7 U.S.C. § 1523. Pilot programs

(a) General provisions

(1) Authority

Except as otherwise provided in this section, the Corporation may conduct a pilot program submitted to and approved by the Board under section 1508(h) of this title, or that is developed under subsection (b) of this section or section 1522 of this title, to evaluate whether a proposal or new risk management tool tested by the pilot program is suitable for the marketplace and addresses the needs of producers of agricultural commodities.

(2) Private coverage

Under this section, the Corporation shall not conduct any pilot program that provides insurance protection against a risk if insurance protection against the risk is generally available from private companies.

(3) Covered activities

The pilot programs described in paragraph (1) may include pilot programs providing insurance protection against losses involving--

(A) reduced forage on rangeland caused by drought or insect infestation;

(B) livestock poisoning and disease;

(C) destruction of bees due to the use of pesticides;

(D) unique special risks related to fruits, nuts, vegetables, and specialty crops in general, aquacultural species, and forest industry needs (including appreciation);

(E) after October 1, 2001, wild salmon, except that–

(i) any pilot program with regard to wild salmon may be carried out without regard to the limitations of this subchapter; and

(ii) the Corporation shall conduct all wild salmon programs under this subchapter so that, to the maximum extent practicable, all costs associated with conducting the programs are not expected to exceed $1,000,000 for fiscal year 2002 and each subsequent fiscal year.

(4) Scope of pilot programs

The Corporation may–

(A) approve a pilot program under this section to be conducted on a regional, State, or national basis after considering the interests of affected producers and the interests of, and risks to, the Corporation;

(B) operate the pilot program, including any modifications of the pilot program, for a period of up to 4 years;

(C) extend the time period for the pilot program for additional periods, as determined appropriate by the Corporation; and

(D) provide pilot programs that would allow producers–

(i) to receive a reduced premium for using whole farm units or single crop units of insurance; and

(ii) to cross State and county boundaries to form insurable units.

(5) Evaluation

(A) Requirement

After the completion of any pilot program under this section, the Corporation shall evaluate the

pilot program and submit to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate a report on the operations of the pilot program.

(B) Evaluation and recommendations

The report shall include an evaluation by the Corporation of the pilot program and the recommendations of the Corporation with respect to implementing the program on a national basis.

(b) Livestock pilot programs

(1) Definition of livestock

In this subsection, the term "livestock" includes, but is not limited to, cattle, sheep, swine, goats, and poultry.

(2) Programs required

Subject to paragraph (7), the Corporation shall conduct two or more pilot programs to evaluate the effectiveness of risk management tools for livestock producers, including the use of futures and options contracts and policies and plans of insurance that protect the interests of livestock producers and that provide--

(A) livestock producers with reasonable protection from the financial risks of price or income fluctuations inherent in the production and marketing of livestock; or

(B) protection for production losses.

(3) Purpose of programs

To the maximum extent practicable, the Corporation shall evaluate the greatest number and variety of pilot programs described in paragraph (2) to determine which of the offered risk management tools are best suited to protect livestock producers from the financial risks

associated with the production and marketing of livestock.

(4) Timing

The Corporation shall begin conducting livestock pilot programs under this subsection during fiscal year 2001.

(5) Relation to other limitations

Any policy or plan of insurance offered under this subsection may be prepared without regard to the limitations of this subchapter.

(6) Assistance

As part of a pilot program under this subsection, the Corporation may provide reinsurance for policies or plans of insurance and subsidize the purchase of futures and options contracts or policies and plans of insurance offered under the pilot program.

(7) Private insurance

No action may be undertaken with respect to a risk under this subsection if the Corporation determines that insurance protection for livestock producers against the risk is generally available from private companies.

(8) Location

The Corporation shall conduct the livestock pilot programs under this subsection in a number of counties that is determined by the Corporation to be adequate to provide a comprehensive evaluation of the feasibility, effectiveness, and demand among producers for the risk management tools evaluated in the pilot programs.

(9) Eligible producers

Any producer of a type of livestock covered by a pilot program under this subsection that owns or operates a farm or ranch in a county selected as a

location for that pilot program shall be eligible to participate in that pilot program.

(10) Limitation on expenditures

The Corporation shall conduct all livestock programs under this subchapter so that, to the maximum extent practicable, all costs associated with conducting the livestock programs (other than research and development costs covered by section 1522 of this title) are not expected to exceed the following:

(A) $10,000,000 for each of fiscal years 2001 and 2002.

(B) $15,000,000 for fiscal year 2003.

(C) $20,000,000 for fiscal year 2004 and each subsequent fiscal year.

(c) Revenue insurance pilot program

(1) In general

Subject to section 1522(e)(4) of this title, the Secretary shall carry out a pilot program in a limited number of counties, as determined by the Secretary, for crop years 1997 through 2001, under which a producer of wheat, feed grains, soybeans, or such other commodity as the Secretary considers appropriate may elect to receive insurance against loss of revenue, as determined by the Secretary.

(2) Administration

Revenue insurance under this subsection shall–

(A) be offered through reinsurance arrangements with private insurance companies;

(B) offer at least a minimum level of coverage that is an alternative to catastrophic crop insurance;

(C) be actuarially sound; and

(D) require the payment of premiums and administrative fees by an insured producer.

(d) Premium rate reduction pilot program

(1) Purpose

The purpose of the pilot program established under this subsection is to determine whether approved insurance providers will compete to market policies or plans of insurance with reduced rates of premium, in a manner that maintains the financial soundness of approved insurance providers and is consistent with the integrity of the Federal crop insurance program.

(2) Establishment

(A) In general

Beginning with the 2002 crop year, the Corporation shall establish a pilot program under which approved insurance providers may propose for approval by the Board policies or plans of insurance with reduced rates of premium--

(i) for one or more agricultural commodities; and

(ii) within a limited geographic area, as proposed by the approved insurance provider and approved by the Board.

(B) Determination by Board

The Board shall approve a policy or plan of insurance proposed under this subsection that involves a premium reduction if the Board determines that–

(i) the interests of producers are adequately protected within the pilot area;

(ii) rates of premium are actuarially appropriate, as determined by the Board;

(iii) the size of the proposed pilot area is adequate;

(iv) the proposed policy or plan of insurance would not unfairly discriminate among producers within the proposed pilot area;

(v) if the proposed policy or plan of insurance were available in a geographic area larger than the proposed pilot area, the proposed policy or plan of insurance would--

(I) not have a significant adverse impact on the crop insurance delivery system;

(II) not result in a reduction of program integrity;

(III) be actuarially appropriate; and

(IV) not place an additional financial burden on the Federal Government; and

(vi) the proposed policy or plan of insurance meets other requirements of this subchapter determined appropriate by the Board.

(C) Time limitations and procedures

The time limitations and procedures of the Board established under section 1508(h) of this title shall apply to a proposal submitted under this subsection.

(e) Adjusted gross revenue insurance pilot program

(1) In general

The Corporation shall carry out, through at least the 2004 reinsurance year, the adjusted gross revenue insurance pilot program in effect for the 2002 reinsurance year.

(2) Additional counties

(A) In general

In addition to counties otherwise included in the pilot program, the Corporation shall include in the pilot program for the 2003 reinsurance year at least 8 counties in the State of California and at least 8 counties in the State of Pennsylvania.

(B) Selection criteria

In carrying out subparagraph (A), the Corporation shall work with the respective State Departments of Agriculture to establish criteria to determine which counties to include in the pilot program.

(f) Camelina pilot program

(1) In general

The Corporation shall establish a pilot program under which producers or processors of camelina may propose for approval by the Board policies or plans of insurance for camelina, in accordance with section 1508(h) of this title.

(2) Determination by Board

The Board shall approve a policy or plan of insurance proposed under paragraph (1) if, as determined by the Board, the policy or plan of insurance–

(A) protects the interests of producers;

(B) is actuarially sound; and

(C) meets the requirements of this subchapter.

(3) Timeframe

The Corporation shall commence the camelina insurance pilot program as soon as practicable after the date of enactment of this subsection.

(g) Sesame insurance pilot program

(1) In general

In addition to any other authority of the Corporation, the Corporation shall establish and carry out a pilot program under which a producer of nondehiscent sesame under contract may elect to obtain multiperil crop insurance, as determined by the Corporation.

(2) Terms and conditions

The multiperil crop insurance offered under the sesame insurance pilot program shall–

(A) be offered through reinsurance arrangements with private insurance companies;

(B) be actuarially sound; and

(C) require the payment of premiums and administrative fees by a producer obtaining the insurance.

(3) Location

The sesame insurance pilot program shall be carried out only in the State of Texas.

(4) Duration

The Corporation shall commence the sesame insurance pilot program as soon as practicable after the date of the enactment of this subsection.

(h) Grass seed insurance pilot program

(1) In general

In addition to any other authority of the Corporation, the Corporation shall establish and carry out a grass seed pilot program under which a producer of Kentucky bluegrass or perennial rye grass under contract may elect to obtain multiperil crop insurance, as determined by the Corporation.

(2) Terms and conditions

The multiperil crop insurance offered under the grass seed insurance pilot program shall--

(A) be offered through reinsurance arrangements with private insurance companies;

(B) be actuarially sound; and

(C) require the payment of premiums and administrative fees by a producer obtaining the insurance.

(3) Location

The grass seed insurance pilot program shall be carried out only in each of the States of Minnesota and North Dakota.

(4) Duration

The Corporation shall commence the grass seed insurance pilot program as soon as practicable after the date of the enactment of this subsection.

7 U.S.C. § 1524. Education and risk management assistance

(a) Education assistance

(1) In general

Subject to the amounts made available under paragraph (5)--

(A) the Corporation shall carry out the program established under paragraph (2); and

(B) the Secretary, acting through the National Institute of Food and Agriculture, shall carry out the program established under paragraph (3).

(2) Education and information

The Corporation shall establish a program under which crop insurance education and information is provided to producers in States in which (as determined by the Secretary)--

(A) there is traditionally, and continues to be, a low level of Federal crop insurance participation and availability; and

(B) producers are underserved by the Federal crop insurance program.

(3) Partnerships for risk management education

(A) Authority

The Secretary, acting through the National Institute of Food and Agriculture, shall establish a program under which competitive grants are made to qualified public and private entities (including land grant colleges, cooperative extension services, and colleges or universities), as determined by the Secretary,

for the purpose of educating agricultural producers about the full range of risk management activities, including futures, options, agricultural trade options, crop insurance, cash forward contracting, debt reduction, production diversification, farm resources risk reduction, and other risk management strategies.

(B) Basis for grants

A grant under this paragraph shall be awarded on the basis of merit and shall be subject to peer or merit review.

(C) Obligation period

Funds for a grant under this paragraph shall be available to the Secretary for obligation for a 2-year period.

(D) Administrative costs

The Secretary may use not more than 4 percent of the funds made available for grants under this paragraph for administrative costs incurred by the Secretary in carrying out this paragraph.

(4) Requirements

In carrying out the programs established under paragraphs (2) and (3), the Secretary shall place special emphasis on risk management strategies, education, and outreach specifically targeted at--

(A) beginning farmers or ranchers;

(B) legal immigrant farmers or ranchers that are attempting to become established producers in the United States;

(C) socially disadvantaged farmers or ranchers;

(D) farmers or ranchers that--

(i) are preparing to retire; and

(ii) are using transition strategies to help new farmers or ranchers get started; and

(E) new or established farmers or ranchers that are converting production and marketing systems to pursue new markets.

(5) Funding

From the insurance fund established under section 1516(c) of this title, there is transferred--

(A) for the education and information program established under paragraph (2), $5,000,000 for fiscal year 2001 and each subsequent fiscal year; and

(B) for the partnerships for risk management education program established under paragraph (3), $5,000,000 for fiscal year 2001 and each subsequent fiscal year.

(b) Agricultural management assistance

(1) Authority

The Secretary shall provide financial assistance to producers in the States of Connecticut, Delaware, Hawaii, Maryland, Massachusetts, Maine, Nevada, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Utah, Vermont, West Virginia, and Wyoming.

(2) Uses

A producer may use financial assistance provided under this subsection to--

(A) construct or improve--

(i) watershed management structures; or

(ii) irrigation structures;

(B) plant trees to form windbreaks or to improve water quality;

(C) mitigate financial risk through production or marketing diversification or resource conservation practices, including--

(i) soil erosion control;

(ii) integrated pest management;

(iii) organic farming; or

(iv) to develop and implement a plan to create marketing opportunities for the producer, including through value-added processing;

(D) enter into futures, hedging, or options contracts in a manner designed to help reduce production, price, or revenue risk;

(E) enter into agricultural trade options as a hedging transaction to reduce production, price, or revenue risk; or

(F) conduct any other activity relating to an activity described in subparagraphs (A) through (E), as determined by the Secretary.

(3) Payment limitation

The total amount of payments made to a person (as defined in section 1308(5) of this title) (before the amendment made by section 1703(a) of the Food, Conservation, and Energy Act of 2008) under this subsection for any year may not exceed $50,000.

(4) Commodity Credit Corporation

(A) In general

The Secretary shall carry out this subsection through the Commodity Credit Corporation.

(B) Funding

(i) In general

Except as provided in clause (ii), the Commodity Credit Corporation shall make available to carry out this subsection not less than $10,000,000 for each fiscal year.

(ii) Exception for fiscal years 2008 through 2012

For each of fiscal years 2008 through 2012, the Commodity Credit Corporation shall make available to carry out this subsection $15,000,000.

(iii) Repealed. Pub.L. 110-234, Title II, § 2801(b)(2), May 22, 2008, 122 Stat. 1085; Pub.L. 110-246, Title II, § 2801(b)(2), June 18, 2008, 122 Stat. 1813

(C) Certain uses

Of the amounts made available to carry out this subsection for a fiscal year, the Commodity Credit Corporation shall use not less than--

(i) 50 percent to carry out subparagraphs (A), (B), and (C) of paragraph (2) through the Natural Resources Conservation Service;

(ii) 10 percent to provide organic certification cost share assistance through the Agricultural Marketing Service; and

(iii) 40 percent to conduct activities to carry out subparagraph (F) of paragraph (2) through the Risk Management Agency.

No. 09-771

In the Supreme Court of the United States

ACCEPTANCE INSURANCE COMPANIES, INC.,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Petitioner owned a subsidiary that issued federally reinsured crop insurance policies. When the subsidiary suffered severe financial losses, petitioner attempted to sell the subsidiary's insurance policies to another insurance company. After the federal government rejected the sale pursuant to its authority as reinsurer, a state agency acting under state law seized the subsidiary in light of its financial condition. The question presented is as follows:

Whether the Fifth Amendment to the Constitution requires the federal government to pay petitioner just compensation for disallowing the sale of the insurance policies to a particular buyer.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 583 F.3d 849. The opinion of the Court of Federal Claims (Pet. App. 21a-43a) is reported at 84 Fed. Cl. 111. A prior opinion of the court of appeals is reported at 503 F.3d 1328. A prior opinion of the Court of Federal Claims is reported at 72 Fed. Cl. 299.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 2009. The petition for a writ of certiorari was filed on December 29, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The United States Department of Agriculture (USDA) provides reinsurance to the nation's crop-insurance industry. Private providers of crop insurance can obtain reinsurance from the Federal Crop Insurance Corporation (FCIC), a federally chartered corporation supervised by USDA's Risk Management Agency (RMA). See 7 U.S.C. 1503 (Supp. II 2008), 1508(a)(1), 6933. Companies that sell crop insurance have no obligation to obtain reinsurance from the FCIC. If they wish to obtain such coverage, they must enter into a contract with the FCIC that is referred to as the Standard Reinsurance Agreement (SRA). See, *e.g.*, S. Rep. No. 301, 103d Cong., 2d Sess. 2 (1994); Pet. App. 3a-4a, 23a n.2.

2. Petitioner owned American Growers Insurance Company, a crop insurer that had entered into an SRA with the FCIC. Pet. App. 4a-5a. In 2002, after American Growers suffered financial reverses, petitioner and American Growers entered into a non-binding letter of intent to sell American Growers' crop-insurance portfolio to another federally reinsured crop insurer, Rain and Hail, LLC. Rain and Hail proposed to purchase approximately 360,000 crop-insurance policies for $21.5 million. *Id.* at 5a.

Pursuant to regulatory rights contained in the SRA, RMA rejected the proposed sale of the crop-insurance policies to Rain and Hail. Pet App. 5a-6a. The Nebraska Department of Insurance later seized American Growers because large financial losses had caused its capital surplus to fall below levels mandated by Nebraska state law. See *id.* at 25a. The Nebraska insurance regulator ultimately liquidated American Growers. *Id.* at 6a. American Growers' remaining active crop-in-

surance policies were subsequently transferred to a number of other approved crop-insurance providers, one of which was Rain and Hail. RMA supervised that reallocation of policies. *Id.* at 25a.[1]

3. Petitioner commenced this action against the United States in the Court of Federal Claims (CFC). In its amended complaint, petitioner alleged that RMA had effected a taking of petitioner's property by rejecting the proposed sale of American Growers' crop-insurance policies to Rain and Hail. Pet. App. 6a-7a, 13a-14a. The CFC initially held that it lacked jurisdiction and transferred the case to the United States District Court for the District of Nebraska. *Acceptance Ins. Cos.* v. *United States*, 72 Fed. Cl. 299 (2006). The court of appeals reversed that ruling and returned the case to the CFC. *Acceptance Ins. Cos.* v. *United States*, 503 F.3d 1328 (Fed. Cir. 2007).

4. On remand, the CFC dismissed the amended complaint for failure to state a claim. Pet. App. 21a-43a. The court concluded that petitioner did not have a cognizable property interest in the right to sell its subsidiary's insurance portfolio to Rain and Hail. The court explained that even after RMA rejected the Rain and Hail transaction, petitioner's subsidiary retained ownership of the insurance policies at issue. Thus, the court held, at most RMA's actions interfered with petitioner's interest in selling the property to Rain and Hail, not

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[1] The insureds or their agents transferred more than 92 percent of the policies to other insurers. RMA assigned the remainder to other federally reinsured companies to avoid a lapse in coverage. See Government Accountability Office, GAO-04-517, *Crop Insurance: USDA Needs to Improve Oversight of Insurance Companies and Develop a Policy to Address Any Future Insolvencies* 20-21 (June 2004), http://www.gao.gov/new.items/d04517.pdf.

with the property itself. *Id.* at 33a. The court characterized that interest in selling to Rain and Hail as "collateral." *Id.* at 33a-34a. The court further held that petitioner's interest in selling the policies was not a constitutionally protected property right because petitioner had voluntarily entered into an industry subject to pervasive government regulation, including a requirement that any sale be subject to RMA's approval. *Id.* at 35a-36a.

5. The court of appeals affirmed. Pet. App. 1a-20a.

The court of appeals first examined "what, if anything, was the subject of the alleged taking." Pet. App. 12a. The court observed that petitioner's allegations in its amended complaint had focused solely upon RMA's rejection of the proposed sale to Rain and Hail and that petitioner had made no allegations concerning the state insurance regulator's seizure of American Growers or RMA's subsequent redistribution of the insurance policies. *Id.* at 13a-14a. The court further noted that petitioner had "made it clear" at oral argument that the basis of its taking claim was the rejection of the proposed sale. *Id.* at 14a-15a. Accordingly, the court of appeals proceeded to examine whether petitioner had a cognizable property interest in the power to sell its subsidiary's portfolio. *Id.* at 15a.

The court of appeals held that petitioner's "ability to freely sell American Growers' insurance portfolio to Rain & Hail" was not a cognizable property interest. Pet. App. 16a. The court assumed that, as a general matter, an insurer's ability to sell or assign its insurance policies would qualify as a protected property right. *Id.* at 17a. The court concluded, however, that no such assumption was warranted in the specialized context of federally reinsured crop insurance. The court explained that petitioner had voluntarily availed itself of the bene-

fits of the government crop-reinsurance program and had accepted the associated restrictions, including relinquishing its right to transfer its policies without RMA's approval. *Id.* at 17a-19a. The court concluded that, although RMA's withholding of such approval "prevented [petitioner] from realizing a business expectation," that regulatory decision had not left petitioner with any lesser property interest than it had possessed before RMA's action. *Id.* at 19a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. The court of appeals correctly identified the gravamen of petitioner's claim. Examining the complaint that was the subject of the government's motion to dismiss, as well as petitioner's statements at oral argument, the court of appeals concluded that petitioner's claim focused on RMA's disapproval of the sale to Rain and Hail, "[n]otwithstanding" various broader arguments petitioner had sought to make in its appellate briefs. Pet. App. 13a; see *id.* at 12a-15a.

Petitioner now contends (Pet. 18-23) that the court of appeals incorrectly identified the basis of its claim, and that it did so on the basis of a supposed "'pinpoint' doctrine." The court of appeals' ruling was based not on any rigid doctrinal principle, however, but on petitioner's own pleadings and statements at oral argument. The court of appeals' interpretation of petitioner's complaint, as clarified by petitioner's subsequent litigation conduct, lacks any legal significance beyond this case and does not warrant further review by this Court.

Because the court of appeals interpreted petitioner's allegations to be challenging *only* the disapproval of the sale to Rain and Hail, several of the contentions petitioner makes in the petition for a writ of certiorari do not relate to any aspect of the court of appeals' reasoning. For instance, petitioner repeatedly insists (Pet. 18-19, 22) that the liquidation of American Growers by the Nebraska Department of Insurance and the subsequent redistribution of American Growers' insurance policies are part and parcel of its taking claim. But the court of appeals did not interpret petitioner's complaint as encompassing such allegations, and it therefore did not address those contentions.[2] Petitioner presents no reason why this Court should review a claim that the court of appeals concluded was outside the scope of the pleadings and therefore did not analyze.

2. Petitioner also contends (Pet. 10-18) that the court of appeals contravened decisions of this Court in analyz-

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[2] In any event, petitioner cites no case in which the United States has been required to pay just compensation for the actions of a State exerting its own sovereign authority, as Nebraska did here when it seized American Growers. To the contrary, such claims have repeatedly been rejected. See, *e.g.*, *B&G Enters., Ltd.* v. *United States*, 220 F.3d 1318 (Fed. Cir. 2000) (rejecting takings claim because State had not acted as an agent of federal government when State enacted statute in response to federal conditions for block grants), cert. denied, 531 U.S. 1144 (2001); *Adolph* v. *FEMA*, 854 F.2d 732 (5th Cir. 1988) (rejecting federal taking claim where federal government had conditioned local participation in its subsidized insurance program upon a locality's outlawing construction in flood-prone areas); cf. *Griggs* v. *Allegheny County*, 369 U.S. 84, 89-90 (1962) (holding that locality, not United States, was liable for taking effected by construction of airport, because although federal agency approved locality's proposed design and construction, "[t]he Federal Government t[ook] nothing").

ing petitioner's asserted property interest in selling its subsidiary's portfolio. That argument lacks merit.

a. Petitioner construes the court of appeals' opinion as announcing an "absolutist" rule that permits the "total extinguishment" of property rights and leaves "no cognizable property interest in *any* circumstances." Pet. 15, 16; see Pet. 10. In fact, the court of appeals' ruling focused narrowly on the particular regulatory framework at issue here, and on RMA's conceded authority to disapprove precisely the action to which petitioner now claims a constitutionally protected entitlement. See Pet. App. 17a-19a. The court of appeals emphasized that participation in the crop reinsurance program is voluntary, that petitioner had retained possession of its insurance policies after the RMA rejection, and that RMA had barred petitioner only from selling them to a particular buyer. *Ibid.*

The court of appeals held that "[u]nder these circumstances," petitioner's claim was not distinguishable from other taking claims the court had rejected "where physical property was retained but a business expectation was frustrated." Pet. App. 19a-20a. Petitioner contends that other decisions by the same court of appeals are to the contrary, but those cases stand—at most—for the proposition that a *change* in an existing regulatory framework may sometimes lead to a compensable taking. See, *e.g.*, *Cienega Gardens* v. *United States*, 331 F.3d 1319, 1350 (Fed. Cir. 2003) ("A business that operates in a heavily-regulated industry should reasonably expect certain types of regulatory changes that may affect the value of its investments. But that does not mean that all regulatory changes are reasonably foreseeable or that regulated businesses can have no reasonable investment-backed expectations whatsoever."). Peti-

tioner cites no case in which a plaintiff successfully claimed a protected property right in the exercise of some power that the *existing* regulatory framework authorized the government to disallow.

For similar reasons, petitioner's reliance upon *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), is misplaced. See, *e.g.*, Pet. 17 n.9. *Lucas* involved real property, which the Court described as enjoying, in our "constitutional culture," somewhat greater protection against total regulatory elimination of its value. 505 U.S. at 1028. Even in that context, moreover, the Court acknowledged the "surely unexceptional" rule that no compensable taking occurs when the government applies *existing* regulatory authority to bar an already-prohibited use. *Id.* at 1030; see *id.* at 1027-1028 (explaining that "in the case of personal property" the power to reach a similar result by adopting *new* restrictions may be greater, and that the owner of personal property "ought to be aware of the possibility that new regulation might even render his property economically worthless") (citing *Andrus* v. *Allard*, 444 U.S. 51, 66-67 (1979)). Here, by entering into the SRA in order to obtain federal reinsurance, petitioner voluntarily relinquished any right to sell the reinsured policies without RMA's agreement. RMA's disapproval of the proposed sale to Rain and Hail therefore did not deprive petitioner of any constitutionally protected property interest, but rather left petitioner with precisely the same property rights in its subsidiary's insurance policies that it had previously possessed. Pet. App. 19a; see Pet. 22.

b. Contrary to petitioner's contention (Pet. 10-11, 16), the court of appeals acted appropriately by first examining whether petitioner had identified a protected property right. The Fifth Amendment requires just

compensation only when private property is taken. Petitioner is therefore incorrect in suggesting that the court of appeals should have proceeded directly to analyze whether a regulatory taking occurred under *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978). The lack of any property right that could have been impaired by the government action eliminated any need to perform a *Penn Central* analysis.[3]

In *Allard*, *supra*, for example, this Court held that the adoption of a complete ban on the sale of eagle feathers had not effected a taking of privately owned feathers. The Court emphasized that a restriction on sale, even a prohibition, does not eliminate the owner's possessory rights or eliminate the property's entire value. The Court therefore saw no need to examine whether the owners had reasonable, investment-backed expectations in the artifacts they had made from eagle feathers before the ban was adopted. See 444 U.S. at 65-67. The restriction at issue here affected only a single transaction with a single buyer, and RMA's authority to disapprove the proposed sale resulted directly from petitioner's voluntary decision to obtain federal reinsurance. The restriction was therefore far less burdensome than the regulation the Court upheld in *Allard*. See Pet. App. 19a.

Petitioner also suggests (Pet. 14-15) that the court of appeals should have begun by examining RMA's regulatory actions for consistency with the governing frame-

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[3] Furthermore, petitioner did not advance a *Penn Central* regulatory-taking theory before the court of appeals; it contended instead that the government had categorically taken its property's entire economic value. Any *Penn Central* theory therefore is not properly presented in this Court. See, *e.g.*, *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212-213 (1998).

work, and that it should have found a taking on the ground that RMA had exercised its authority for a "strained, irrelevant, unexpected and unprecedented reason." But petitioner does not actually contend that RMA lacked authority to prevent the sale—only that it misapplied that authority. Even if that contention (which petitioner did not make in the court of appeals) were accepted, it would not call into question the court of appeals' reasoning. As the court of appeals explained, RMA's alleged previous willingness to approve similar transactions did not give petitioner (or any other regulated entity) a property right to continued forbearance by the agency. See Pet. App. 18a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2010

SUPREME COURT, U.S.
APR 9 - 2010

No. 09-771

In the Supreme Court of the United States

ACCEPTANCE INSURANCE COMPANIES, INC.,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITIONER'S REPLY BRIEF

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REPLY BRIEF OF PETITIONER ACCEPTANCE INSURANCE COMPANIES INC.

The Petition raises important issues regarding the Federal Circuit's approach in regulatory takings cases. The Petition demonstrates that in the underlying decision the Federal Circuit has moved in a direction contrary to this Court's realistic, flexible and practical approach to the analysis of takings claims. The government's Brief in Opposition denies the troubling aspects of the Federal Circuit's opinion and argues the case is not of sufficient significance to merit review by this Court. To the contrary, the case reveals the Federal Circuit developing doctrines of its own devise that have broad significance, especially in regulatory takings cases. This case affords the Court the opportunity to review the Federal Circuit's developing doctrines and provide more definite guidance in the area of regulatory takings.

I. Equating Entry Into a Regulated Industry with Extinguishment of Fundamental Property Rights.

The Federal Circuit held that because the Department of Agriculture's Risk Management Agency (RMA), had authority to approve or disapprove the sale of Petitioner's portfolio of crop insurance policies, Acceptance by definition had no property right in the disposition of that business. "Acceptance . . . did not possess an unfettered right to sell or otherwise transfer the policies, thus precluding the existence of a cognizable property interest." App. 17a-18a, 583 F.3d at 858. The rights to possess, use and dispose of property are fundamental. In the regulated industry context, any or all of those rights may be affected,

limited or conditioned to some degree or another, and thus are not "unfettered." If entirely "unfettered" is the standard in measuring property rights as the Federal Circuit now suggests, then one can never be said to have property rights whenever regulation touches upon those rights. This is inconsistent with this Court's precedent. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."); *Cienega Gardens v. United States*, 331 F.3d 1319, 1331 (Fed. Cir. 2003) (rejecting the argument that government action in a "pervasively regulated industry" can never constitute a taking of private rights).

Plainly there is a distinction between limitations on a property right and the complete extinguishment of a property right. The Federal Circuit's approach does not recognize such a distinction and the court, therefore, does not examine the particulars of the regulatory framework, either under the *Lucas* or *Penn Central* tests, to see whether those who enter the field of regulation may justly be said to have lost a fundamental property right, and if so, under what circumstances. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1973). The analysis cannot be so oversimplified. A major portion of the nation's economy and private investment is in regulated industries. Those who invest in regulated industries should not be denied the ability to bring takings claims to protect their interests on the theory that they lose otherwise fundamental property rights by virtue of the regulation itself. When property rights are affected by regulation, a court must undertake a nuanced examination of the nature of the regulation,

its scope and its purpose, and how it was invoked in the particular circumstances in considering whether the owner of the property retains a compensable interest in the property. That is why this Court has emphasized that proper takings analysis is essentially an ad hoc factual inquiry. *Lucas*, 505 U.S. at 1015 (1992); *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 227 (1986).

This case raises the fundamental question of when and under what circumstances one loses a fundamental property right upon entry into a regulated industry. The government's brief does not squarely address this question, or even frankly acknowledge it, even though it immediately springs to the fore in light of the Federal Circuit's facile leap to the conclusion that the general regulatory authority of the RMA, which one assumes may curtail the right of disposition in *some* circumstances, extinguishes the right of disposition in *all* circumstances. The mere fact that regulation touches a right does not support the conclusion that the right is extinguished. Rather, regulation may be held to extinguish a fundamental property right only upon the kind of searching, ad hoc analysis that has informed this Court's takings jurisprudence for generations, such as that required by *Lucas* or *Penn Central*. A properly directed analysis would not support the Federal Circuit's conclusion that Acceptance's participation in the regulated crop insurance industry left it without any cognizable right to sell its business, regardless of circumstances. Indeed, circumstances determine expectations, and expectations help define the scope of the property right in question.

If entry into a regulated industry in and of itself can extinguish fundamental property rights, then this Court should define the analytical framework to be applied to reach that conclusion. Clearly, the Federal Circuit's superficial analysis, which takes regulated industry cases outside the purview of the Fifth Amendment any time regulation touches upon an asserted property right, leaves much to be addressed. The potential result is a near *per se* exception from takings liability in regulated industry cases, contrary to the Federal Circuit's own holding in *Cienega Gardens*. The government's Brief simply does not address the real issue, namely the clear need for a better analytical framework for determining the validity of takings claims in regulated industries.

II. The Assertion that it is Necessary to Pinpoint a Single, Discrete Act as Constituting the Taking.

The Federal Circuit applied a doctrine of its own making in declaring that it is necessary to pinpoint a single, discrete governmental act as constituting the taking. App. 12a-13a; 583 F.3d at 855. Even though the Federal Circuit explicitly stated this as a rule of law, the government argues that the court was only holding Acceptance to a concession made in oral argument or implied from the complaint. Resp. Br. at 5. In fact, the particulars of the takings claim had been clarified in the Court of Federal Claims, which acknowledged that the taking alleged encompassed a chain of events including the RMA's blocking of the proposed sale, the RMA's subsequent exercise of control over the policies and its redistribution of the policies to other crop insurers. App. 25a-26a; 84 Fed. Cl. at 113; see Pet. at 19-20.

The purported rule of law the Federal Circuit used allowed it to truncate the analysis of the operative chain of events, looking only at the first act of denying the transaction while ignoring the remainder of the sequence. This artificial division of plainly interrelated causes and effects allowed the court to ignore the fact that the RMA-orchestrated events necessarily and predictably resulted in the categorical taking and permanent loss of all of Acceptance's property interest in its crop insurance business, including the physical dispossession of the policies themselves.

As noted in the Petition, the "pinpoint" doctrine propounded by the Federal Circuit does not appear in this Court's takings precedents, but is rather a construct developed by the Federal Circuit. See Pet. at 20-22. The government does not contend otherwise. The Petition asks whether this doctrine can be squared with this Court's insistence that takings claims require flexible, realistic, ad hoc analysis. See Pet. at 20-21. The segmentation of connected events allowed the Federal Circuit to avoid the fact that the RMA rejected the sale so it could assert control over the policies during the state liquidation proceeding and redistribute them to other insurers in a setting that would insulate it from a feared risk of lawsuits by disgruntled insurance agents. Pet. at 21. The court's deliberate refusal to consider the full constellation of operative events by application of its pinpoint doctrine is neither logical nor realistic.

The rule of law developed and applied by the Federal Circuit does not have its genesis in any precedents of this Court, is the antithesis of realistic analysis, and opens the door to the denial of takings

claims based on the artificial displacement of clearly interrelated acts. As such, it is a doctrine that demands this Court's review. The government's argument that this case does not have significance beyond the narrow facts pled in the complaint is incorrect. The Federal Circuit has developed and applied a rule of law which is the polar opposite of a commonsense, realistic acknowledgement of the interrelatedness of events, and which has never been reviewed by this Court. By separating the bow from the arrow and the target, the reality of events is obscured and an artificial procedure is endorsed that inevitably will invalidate takings claims merely because they are based on an intrinsically interconnected chain of events instead of a single, discrete act. A doctrine with such obvious broad implications is worthy of this Court's consideration.

CONCLUSION

For the foregoing reasons, and those stated in Acceptance's Petition, the writ of certiorari should be granted.

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